Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

BRANDON L. BRYANT,

Petitioner,

v.

COMPASS GROUP USA, INC.,
Individually and d/b/a CHARTWELLS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN WERNER
REAUD, MORGAN & QUINN, L.L.P.
801 Laurel Street
P. O. Box 26005
Beaumont, TX 77720-6005
(409) 838-1000

KIRK L. PITTARD*
DURHAM & PITTARD, LLP
P.O. Box 190310
Dallas, Texas 75219
(214) 946-8000

Attorneys for Petitioner

* *Counsel of Record*

197126

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Under Title VII of the Civil Rights Act of 1964, does the standard of review concerning a motion for judgment as a matter of law require consideration of evidence supporting the claimant's prima facie case of discrimination?

2. Does it violate the Seventh Amendment right to trial by jury to require a plaintiff to choose between a remittitur of damages or a new trial?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 14.1(b) of the Rules of the Supreme Court of the United States.

1. Brandon L. Bryant, *Petitioner*

2. Kirk L. Pittard, *Lead Counsel for Petitioner*

3. John Werner, *Co-Counsel for Petitioner*

4. Compass Group USA, Inc., Individually and d/b/a Chartwells, *Respondent*

5. Kerry E. Notestine
   Deke W. Bond
   Littler Mendelson, P.C.
   Chevron Tower, Suite 1900
   1301 McKinney Street
   Houston, Texas 77010
   (713) 951-9400
   FAX (713) 951-9212
   Counsel for Respondent

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JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered June 16, 2005 by a Writ of Certiorari under 28 U.S.C. § 1254(1). The Motion for Rehearing denied July 13, 2005 (App. H).

STATUTORY PROVISIONS INVOLVED

One statutory provision construed in this case is Title VII of the Civil Rights Act of 1964 which states: "(a) Employer practices

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"

42 U.S.C. § 2000e-2(a)(1).

Another statutory provision construed in this case is Title VII of the Civil Rights Act of 1964 which states: "(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

43 U.S.C. § 2000e-3(a).

This case also involves a construction of the re-examination clause embodied in the Seventh Amendment to the United States Constitution which states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Texas had federal question subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331. A jury found that Petitioner, Brandon Bryant ("Bryant"), was terminated from his job because of his race or because he filed an EEOC charge of discrimination. (App. at 47a-48a). The jury awarded Bryant $42,500.00 in lost wages, $160,000 in compensatory damages, and $350,000.00 in punitive damages. (App. at 49a-54a). The district court gave Bryant the option of accepting a remittitur of the damages or a new trial. (App. at 16a-19a). Under protest, Bryant accepted the remittitur. (App. at 14a-15a). The district court then entered judgment as modified by the remittitur and other post trial considerations in the amount of $32,556.22 in back pay, $150,000.00 in compensatory damages, $36,500.00 in attorneys fees, and eliminated the punitive damage award. (App. at 20a-21a). The United States Court of Appeals for the Fifth Circuit reversed and rendered, holding that Respondent was entitled to judgment as a matter of law under Federal Rule of Civil Procedure 50. (App. at 1a).

BACKGROUND FACTS

Bryant, who is Caucasian, began working for Compass Group USA, Inc. d/b/a/ Chartwells ("Chartwells") at their Lamar University food services operation in July 2000. (7 RR 89, 7 RR 91). Between his starting date and late March 2002, Bryant received three raises and had no instances of discipline noted in his file. (7 RR 92, 192). As the trial court noted, Bryant had also been considered by many to have been the executive chef, or at least acting executive chef, for some time. (2 RR 492; App. at 37a). Bryant worked among a group, approximately 11% of which were Caucasion. (9 RR 120).

On March 26, 2003, Bryant filed a Charge of Discrimination with the EEOC. (7 RR 134; Plaintiff's Ex. 7). Bryant believed that he had been subject to various acts of discrimination after the arrival at Chartwells of Mr. Ricardo Saldana ("Saldana") as the Executive Chef and Saldana's sister-in-law, Francelia Madrigal ("Madrigal"), both of whom are Hispanic. Bryant's Charge was addressed to Chartwell's local offices in Beaumont and was also made known to two senior decision-makers in Chartwells. (9 RR 117, 305). Furthermore, the Charge was addressed to the local Lamar Chartwells location, where it would have presumably been available to Max Mitchell ("Mitchell"), Chartwells' food director at Lamar, if not Saldana as well. (Plaintiff's Ex. 7).

Shortly after Bryant filed the EEOC Charge, on April 9, Chartwells District Manager, Jon Walters, directed Saldana to create a document listing various transgressions by Bryant for which there was no previous documentation. (7 RR 236; 9 RR 41). Pursuant to this directive, Saldana listed a series of thefts, sabotage, and general malfeasance he attributed to Bryant. (Plaintiff's Ex. 7). However, Saldana conceded that for all but one of the allegations, he had absolutely no proof or evidence connecting Bryant to the alleged misdeeds. (7 RR 236-242). As to the one exception, when Saldana claimed to have an eyewitness who spotted Bryant with an alleged "stolen" knife, the eyewitness was Maria Ortiz whose credibility was tainted as discussed in more detail below. (9 RR 57).

Also on April 9, 2002, Bryant was told that he needed to report to the Lamar Campus police because they had been provided some empty gift envelopes which had allegedly been stolen from an event catered by Chartwells on April 6.

(7 RR 144). The empty envelopes had been provided by Saldana, who in turn claimed that he had received them from Madrigal. (9 RR 29). Madrigal claimed to have retrieved them by climbing into a trash dumpster the day after the catered event at the beginning of her shift as a food service worker. (9 RR 87-88). Madrigal said she knew to look there because another Hispanic employee, Maria Ortiz, and/or her son, Alex Ortiz, had said that Bryant put the envelopes in the dumpster. (9 RR 82-84). Furthermore, Madrigal, Maria Ortiz and Alex Ortiz all allegedly claimed to be eyewitnesses to Bryant's theft of the envelopes, although interestingly none of them made any effort to alert the law enforcement officers who were present during the catered event. (7 RR 200, 224; 9 RR 73).

Faced with the choice of being arrested or merely paying back the $26 that had allegedly been taken from the gift envelopes, Bryant chose to pay the $26. (7 RR 145-46). Bryant bought a money order and wrote a note to the client for whom Chartwell had catered the event informing the client of his innocence and explaining that he was only paying the money because his family could not afford for him to go to jail. (7 RR 148). Bryant provided the campus police with all of this information. (7 RR 148; Plaintiff's Ex. 1). Nevertheless, Chartwells terminated Bryant.

The evidence at trial demonstrated that Mitchell, Saldana, Madrigal, and the Ortizes had conspired to "set up" Bryant. For instance, Saldana and Madrigal, without explanation, showed up unannounced at the catered event, though they had not been scheduled to work there. (9 RR 69-70). Additionally, Madrigal and the Ortizes claimed to have been specifically observing Bryant during the time that it took him to take the envelopes, at approximately the

distance of less than the length of the courtroom, even though Bryant was unable to see them watching him and despite the fact that they were allegedly in plain view. (7 RR 204, 208, 227-228; 9 RR 74-75). Also, although Madrigal and the Ortizes claimed to have seen Bryant steal the gift envelopes and stuff them into his clothes, while at a catered event with two or more peace officers present, none of them reported this to the peace officers or confronted Bryant while he was allegedly walking around for at least twenty minutes "red-handed." (7 RR 200, 224; 9 RR 77-78). Moreover, Madrigal and Maria Ortiz claimed that Alex Ortiz had observed Bryant unloading the empty gift cards into the dumpster at the Main Dining Hall despite the fact that Alex Ortiz testified that he had never seen Bryant with the gift cards at the Main Dining Hall. (7 RR 206-07, 229-30; 9 RR 82-84). Furthermore, Madrigal had not been scheduled to work on the Sunday after the catered event, but claimed to have been called in unexpectedly by Mitchell, and thereafter "found" the empty gift envelopes. (9 RR 81). Madrigal claimed to have physically climbed into the dumpster to "find" the empty gift envelopes early Sunday morning, and then continued to work at her food service job the rest of the day. (9 RR 87-88). Mitchell ultimately ended up with the empty gift envelopes and allegedly received them from Saldana, who claimed that he had received them from Madrigal. (9 RR 29, 87-88).

A Chartwells executive testified that any Chartwells employee who stole, even "2.6 cents [sic]," would be terminated. (9 RR 248-49). However, multiple witnesses testified that Maria Ortiz and her son, Alex, had been caught on numerous occasions taking liquor, centerpieces, and other decorative items at parties that they catered for Chartwells without incident. (7 RR 130 [theft of alcohol]; 7 RR 131

[theft of centerpieces]; 9 RR 181 [theft of decorations]; 9 RR 181 [theft of bottles of hard liquor and a case of beer]; 9 RR 182 [theft of decorative crown centerpieces]; 9 RR 199-200 [same]). Thus, the record reflects that, while Chartwells terminated Bryant based on a suspicion of theft of $26, it was a matter of company policy to turn a blind eye towards the multiple acts of dishonesty and violations of federal law committed by Maria Ortiz.

The trial court concluded that the evidence demonstrated that the Defendant's took the approach that Bryant was a low level employee like Maria Ortiz. (2 RR 490; App. at 35a). Furthermore, the evidence demonstrated that Mitchell, defendant's food director at Lamar and one of the three individuals who made the decision to fire Bryant, had been aware that Ms. Ortiz had pilfered food, alcoholic beverages, and/or table decorations, yet took no disciplinary action against her. (2 RR 490; App. at 35a). However, Bryant, a Caucasion, who the Defendant viewed as a low level hourly employee was fired. The trial court also noted that Lt. Bowden admitted that Bryant did not actually admit to being guilty of stealing the gift envelopes and that because the original charges against Bryant for theft were brought by a Hispanic woman, who had been known to steal with impunity, and brought by Madrigal, also Hispanic, such evidence could raise an inference of race-based animus. (2 RR 491; App. at 36a). The trial court explained that the strength of the inference was increased by evidence that Madrigal was the sister-in-law of the executive chef, Saldana, also Hispanic, who upon request, came up with a long list of allegations of theft against Bryant, which had never previously been documented. (2 RR 491; App. at 36a).

The trial court further explained the strength of Bryant's claim of retaliation for filing the EEOC Charge noting that Bryant filed the Charge three weeks before he was discharged. (2 RR 491; App. at 36a). The trial court noted that resolution of the issue would require an evaluation of the credibility of the defendant's managers to determine whether the filing of the EEOC claim was a substantial or motivating factor in discharging Bryant. (2 RR 491; App. at 36a). The trial court then detailed the evidence which could have tainted the credibility of Chartwells' managers. (2 RR 491-92; App. at 36a-38a).

Furthermore, the trial court noted that, Mitchell, a member of the management team and an African-American, was involved in the decision to terminate Bryant and that Mitchell was aware of the animosity that existed between Bryant and both Saldana and Madrigal. (2 RR 492-93; App. at 38a). The trial court concluded that this evidence was sufficient for a jury to find that a substantial or motivating factor in the decision to terminate Bryant's employment was his race or the fact that he had filed an EEOC Charge, and the same decision would not have been made in the absence of those factors. (2 RR 493; App. at 38a).

REASONS FOR GRANTING THE PETITION

I. This Court should grant Certiorari because the Fifth Circuit's decision, which essentially requires a "pretex plus" analysis, conflicts with this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, regarding the standard for overcoming a judgment as a matter of law in the context of a claim involving discriminatory and retaliatory termination.

In reviewing the disposition of a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, the reviewing court should review all of the evidence in the record. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 2110 (2000). Moreover, the reviewing court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations. *Reeves*, 530 U.S. at 150, 120 S. Ct. at 2110. Furthermore, the court should give credence to the evidence favoring the nonmovant as well as the evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that such evidence comes from disinterested witnesses. *Reeves*, 530 U.S. at 151, 120 S. Ct. at 2110.

1. Claims for Discrimination Under Title VII.

Pursuant to Title VII and relevant case law, a plaintiff must establish a prima facie case of discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S. Ct. 2097, 2106 (2000) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973)). The specific evidentiary requirements for proving a prima facie case of discrimination under Title VII will vary depending on the

facts of a particular case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 n.13, 93 S. Ct. 1817, 1824 (1973).

In situations involving a claim for reverse race discrimination, a plaintiff's prima facie case requires evidence that: (1) the plaintiff is a member of a protected group; (2) he was qualified for the position held; (3) he was discharged from the position; and (4) he was replaced by someone outside of the protected group. *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000).

In situations involving a claim for retaliatory discharge for filing an EEOC claim, a plaintiff's prima facie case will require evidence that (1) the plaintiff was engaged in protected Title VII activity (i.e. the filing of an EEOC claim); (2) the plaintiff was subjected to an adverse employment action; and (3) there is a causal link between the protected activity and the adverse employment action. *Haynes v. Pennzoil Co.*, 207 F.3d 296, 299 (5th Cir. 2000).

After establishing a prima facie case of discrimination, the burden shifts to the defendant to produce evidence that the plaintiff was rejected, or someone else was preferred for employment, for a legitimate nondiscriminatory reason. *Reeves*, 530 U.S. at 142, 120 S. Ct. at 2106. "This burden is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves*, 530 U.S. at 142, 120 S. Ct. at 2106. If the defendant meets this burden, the plaintiff must then persuade the trier of fact that the defendant intentionally discriminated against the plaintiff. *Reeves*, 530 U.S. at 143, 120 S. Ct. at 2106. In order to satisfy its burden of persuasion, the plaintiff must be afforded the opportunity to prove that the defendant's nondiscriminatory explanation offered by the defendant was not the true reason, but was a pretext for

discrimination. *Reeves*, 530 U.S. at 143, 120 S. Ct. at 2106. "That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" *Reeves*, 530 U.S. at 143, 120 S. Ct. at 2106. A plaintiff can prove pretext in two ways: (1) indirectly, by showing that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable; or (2) directly, by showing that unlawful discrimination more likely motivated the employer. *Chuang v. University of California Davis, Bd. of Trustess*, 225 F.3d 1115, 1127 (9th Cir. 2000). These two approaches are not mutually exclusive. *Id.*

Although any presumption of discrimination drops out of the case once the defendant meets its burden of production, "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.'" *Reeves*, 530 U.S. at 143, 120 S. Ct. at 2106. Furthermore, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves*, 530 U.S. at 147, 120 S. Ct. at 2108.

With regard to the role of the evidence of the plaintiff's prima facie case, the Court has stated that:

> [t]he factfinder's disbelief of the reasons put forward by the defendants (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will

> *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

Reeves, 530 U.S. at 147, 120 S. Ct. at 2108 (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742 (1993)). "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148, 120 S. Ct. at 2109.

2. *Reeves v. Plumbing Products, Inc.*

In *Reeves*, this Court noted that the Fifth Circuit "ignored the evidence supporting petitioner's prima facie case and challenging respondent's explanation for its decision." *Reeves*, 530 U.S. at 146, 120 S. Ct. at 2108. The court of appeals "proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination." *Reeves*, 530 U.S. at 146, 120 S. Ct. at 2108. This Court concluded that the court of appeals misconceived the evidentiary burden borne by a plaintiff who is attempting to prove intentional discrimination through indirect evidence. *Reeves*, 530 U.S. at 146, 120 S. Ct. at 2108.

The Court stated that "because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." *Reeves*, 530 U.S. at 149, 120 S. Ct. at 2109. Moreover, the Court

concluded that the court of appeals misapplied the standard of review dictated by Rule 50 by "disregarding critical evidence favorable to the petitioner—namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation." *Reeves*, 530 U.S. at 152, 120 S. Ct. at 2111. The Court noted that the court of appeals also "failed to draw all reasonable inferences in favor of petitioner." *Reeves*, 530 U.S. at 152, 120 S. Ct. at 2111. The Court ultimately concluded that the court of appeals "impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Reeves*, 530 U.S. at 153, 120 S. Ct. at 2111.

As Justice Ginsburg noted in her concurring opinion:

> it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond [evidence establishing a prima facie case and evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false] in order to survive a motion for judgment as a matter of law.

Reeves, 530 U.S. at 154, 120 S. Ct. at 2112 (Ginsburg, J., concurring). Furthermore, ultimate questions of liability should not ordinarily be taken from the jury "once the plaintiff has introduced the two categories of evidence described above." *Reeves*, 530 U.S. at 155, 120 S. Ct. at 2112 (Ginsburg, J., concurring). Justice Ginsburg encouraged further elaboration by the Court in an appropriate case regarding this issue. *Reeves*, 530 U.S. at 155, 120 S. Ct. at 2112 (Ginsburg, J., concurring).

In the present case, the Fifth Circuit once again engaged in a review of a jury verdict in favor of a Title VII plaintiff in a manner that is inconsistent with Title VII jurisprudence and this Court's holding in *Reeves*. Bryant offered evidence of a prima facie case of both reverse race discrimination and retaliatory discharge for filing an EEOC charge. However, the Fifth Circuit did not consider Bryant's prima facie case nor discuss how Bryant's prima facie case factored into the court's evidentiary analysis.

In determining whether the evidence was sufficient to support the jury's verdict, it is apparent from *Reeves* the importance of the evidence supporting the plaintiff's prima facie case in conjunction with evidence that the defendant's purported explanation for the discharge was false. In light of the jury's verdict, findings by the trial court, and evidence that Bryant's termination was the result of a scheme concocted by Bryant's Hispanic counterparts, which demonstrated that Chartwell's proffered explanation for Bryant's termination was pretext, it was incumbent upon the court of appeals to address evidence of Bryant's prima facie case and how such evidence factored into the court's evidentiary analysis. By failing to do this, the Fifth Circuit imposed an evidentiary burden on Bryant that is inconsistent with *Reeves* and that would essentially require a "pretext plus" evidentiary standard which was expressly rejected by this Court in *Reeves*.

II. This Court should grant Certiorari because there is a split among the federal circuit courts regarding whether the standard of review concerning evidence of discriminatory and retaliatory termination requires consideration of the evidence supporting the plaintiff's prima facie case of discrimination.

Consistent with *Reeves*, at least two circuit courts have recognized that a reviewing court is to consider the evidence supporting the plaintiff's prima facie case in making its ultimate determination regarding the issue of pretext. *Miller v. EBY Realty Group LLC*, 396 F.3d 1105, 1111 (10th Cir. 2005); *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 812 (10th Cir. 2000); *Ash v. Tyson Foods, Inc.*, 129 Fed. Appx. 529, 534 (11th Cir. 2005) (unpublished); *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1274 n.7 (11th Cir. 2002); *Green v. School Bd. of Hillsborogh County*, 25 F.3d 974, 978-80 (11th Cir. 1994) (considering whether plaintiff established prima facie case in analyzing whether district court's finding of intentional discrimination was supported by substantial evidence). Even the Fifth Circuit once recognized this in a case handed down prior to the present case. *See Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 575, 576 (5th Cir. 2003)

> Under *Reeves*, Palasota's establishment of a *prima facie* case combined with doubt cast on Haggar's proffered supposed non-discriminatory explanation for termination—that Palasota voluntarily resigned—are sufficient to support liability. . . . [The district court's holding] runs counter to *Reeves*, which holds that the establishment of a *prima facie* case and evidence casting doubt on the veracity of the employer's explanation is sufficient to find liability.

However, in another case handed down before *Bryant*, the Fifth Circuit suggested that parsing the evidence into discrete segments corresponding to the plaintiff's prima facie case is unimportant when the case has been fully tried on the merits. *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 385-86 (5th Cir. 2003); *see also Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463, 468 (5th Cir. 2002) (refusing to consider evidence of plaintiff's prima facie case when the case has been fully tried on the merits). Thus, *Bryant* represents an apparent shift in the Fifth Circuit from the dictates of *Reeves* constituting a split of authority with other circuits addressing this issue.

III. This Court should grant Certiorari because the Petitioner properly raised an important question of constitutional law that has not yet been decided by this Court regarding whether it violates the Seventh Amendment right to trial by jury to require a party to choose between remittitur of damages or a new trial.

As previously noted, the trial judge in this case required Bryant to accept a remittitur of damages of an amount determined by the trial judge or accept a new trial of the matter. (2 RR 589-91; App. at 16a-19a). Bryant conditionally accepted the remittitur expressly reserving his right to appeal the appropriateness of the remittitur/new trial "option." (2 RR 592-93; App. at 14a-15a).

Bryant understands that generally when a plaintiff accepts a remittitur of damages, the plaintiff cannot raise the propriety of the remittitur on appeal. *See Sulzer Carbomedics, Inc. v. Oregon Cardo-Devices, Inc.*, 257 F.3d 449, 460-61 (5th Cir. 2001). Consequently, Bryant

conditionally accepted remittitur expressly preserving the issue for appellate review. If by conditionally accepting a remittitur and expressly preserving the issue for appellate review, a litigant is still precluded from raising the propriety of the remittitur/new trial "option" on appeal, there would in effect be no meaningful appellate review of a process that significantly impacts the rights of a plaintiff. Therefore, by conditionally accepting remittitur, Bryant has preserved this issue for appellate review where there otherwise would be no means of such review.

Because the court of appeals disposed of the case by reversing and rendering judgment for Chartwells, the court of appeals declined to address the remittitur/new trial issue. *Bryant*, 413 F.3d at 479 n.6. However, because this issue was properly presented to the court of appeals, the Court should also grant the petition with regard to the remittitur/new trial issue; otherwise, Bryant will have had no opportunity for meaningful appellate review either at this level or the court of appeals level. As one federal judge recently opined, the constitutionality of the remittitur practice merits evaluation by the federal courts. *McKissack v. Wal-Mart Stores, Inc.*, No. SA-02-CA-0043-RF, 2004 WL 212930, *5 n.35 (W.D. Tex. Jan. 26, 2004).

1. The constitutionality of the remittitur/new trial "option" has never been adjudicated by this Court.

In *Dimick v. Schiedt*, the Court discussed the constitutionality of remittitur in the context of the Court's decision that additur, the increase of a jury's verdict by a court, was unconstitutional. 293 U.S. 474 (1935); *see also* Suja A. Thomas, *Re-Examining the Constitutionality of*

Remittitur Under the Seventh Amendment, 64 OHIO ST. L.J. 731, 747-50 (2003) (analyzing the *Dimick* case and the constitutionality of the remittitur/new trial option). In determining whether the practice of additur was constitutional under the Seventh Amendment, the Court stated that the analysis must turn to the "appropriate rules of the common law established at the time of the adoption of [the Seventh Amendment] in 1791." *Dimick*, 293 U.S. at 476. The Court determined additur was not an established practice under the English common law at the time the Seventh Amendment was passed in 1791. *Id.* at 482. The Court then considered the argument that because federal courts currently employ remittitur, they should also employ the analogous practice of additur. *Id.*

In dicta, the Court discussed the constitutionality of remittitur. *Id.* at 477-85. However, in reviewing the English common law as it existed in 1791, the Court cited only one English case that discussed the reduction of verdicts in which the court had actually rejected any such power of courts to reduce verdicts. *Id.* (citing *Beardmore v. Carrington*, 95 Eng. Rep. 790 (1764)). Moreover, the suggestion in *Dimick* that federal courts have practiced remittitur for over one hundred years since 1822 is overstated. Thomas, *supra* at 790. In fact, the first case in which a court actually applied remittitur came in 1871. *Id.* at 790-91. In *Russell v. Place*, a circuit judge ordered remittitur of lost profit damages in a patent infringement case and cited no authority in support of its power to do so. 21 F. Cas. 57 (C.C.N.D.N.Y. 1871) (No. 12,161). From the late 1870s until 1935, when *Dimick* was decided, reports of federal remittitur became more frequent. Thomas, *supra* at 791. However, this sporadic use of remittitur by so few courts undermines the notion in *Dimick* that remittitur had been utilized in federal courts for over

one hundred years. *Id.* Nevertheless, the Court concluded that "there was some practice . . . in respect of decreasing damages." *Dimick*, 293 U.S. at 482. More importantly, however, the Court noted that it was not deciding the question of the constitutionality of remittitur and stated that "it . . . may be that if the question of remittitur were now before us for the first time, it would be decided otherwise." *Id.* at 484. While the Court has cited *Dimik* in summarily endorsing the constitutionality of remittitur, *see, e.g.*, *Hetzel v. Prince William County*, 523 U.S. 208, 211, 118 S. Ct. 1210, 1211-12 (1998), the Court has never analyzed whether the remittitur/new trial "option" is illusory and, therefore, in violation of the Seventh Amendment.

2. The requirement to accept a remittitur of damages or a new trial is unconstitutional under the "re-examination" clause of the Seventh Amendment.

Under the Seventh Amendment, facts found by a jury may be re-examined only "according to the rules of the common law." U.S. CONST. AMEND. VII. However, by ordering a plaintiff to either accept a court determined remittitur or, in the alternative, a new trial, the trial court effectively re-examines facts found by the jury. Thomas, *supra* at 788-89. Whether "common law" as found in the re-examination clause of the Seventh Amendment refers to the English common law as it existed at the time the Seventh Amendment was passed in 1791 or refers to the evolving common law of the United States, the common law did not allow nor does it now allow trial courts to usurp the role of the jury as fact finder by way of the remittitur/new trial process. *Id.* at 782, 789.

Under English Common law, remittitur was a completely different process than the remittitur procedure used by the federal courts today. Under the English common law in 1791, remittitur was used to correct potentially fatal errors in the court record such as (1) when a jury awarded more than what was sought by the plaintiff's declaration; (2) to correct an insubstantial mistake regarding the damages in the declaration; and (3) to cure an error in cases in which a verdict was awarded on all the counts although one of multiple counts was invalid. *Id.* at 764-69. However, the common law use of remittitur in these instances does not resemble the use of remittitur by federal courts to reduce jury verdicts according to the judge's determination of the damages in a case. At common law, the courts did not interfere with the determination of damages by the jury other than to order new trials in cases in which the court found the damages excessive. *Id.* at 775-82. Moreover, two cases decided by the House of Lords after the adoption of the Seventh Amendment confirm that under English common law in 1791 a court could not reduce a jury's verdict as an alternative to a new trial for excessive damages upon the verdict winner's consent to the reduction. *Watt v. Watt*, (1905) App. Cas. 115; *Lionel Barber & Co. v. Deutsche Bank*, (1919) App. Cas. 304; Thomas, *supra* at 772-74.

3. Remittitur impinges a plaintiff's right to trial by jury.

Under evolving United States common law since 1791, the practice of requiring a remittitur or new trial "option" is unconstitutional because it fails to preserve the role of the jury as fact-finder as it functioned at common law. Thomas, *supra* at 784-89. For instance, when a trial judge remitting a jury verdict renders an opinion as to the greatest amount that

a reasonable jury could have awarded, such a pronouncement from the bench alters the nature of any potential new trial as well as the settlement posture of the parties. *Id.* at 786. Otherwise, if there were no pronouncement by the trial judge regarding the maximum damages a reasonable jury could find under the facts of the case, the second jury's verdict would not be subject to this judge-determined maximum figure. *Id.* at 787.

In such situations, the plaintiff will not accept a new trial because even if the second trial results in a verdict that is greater or the same as the previous jury's verdict, the same judge will oversee the same evidence in the case, and that judge has already determined the maximum amount that a reasonable jury could award under the facts of the case. *Id* at 734. If, upon retrial, a jury awarded an amount greater than was awarded in the first trial, there is every reason to believe that the judge will reduce the damages yet again because it is the same judge who previously determined the remitted amount was the maximum award under the facts of the case. Thus, a plaintiff is left with a Hobson's choice: retry the case even though the judge has already declared the maximum amount that a jury could award or accept remittitur to an amount determined by the trial judge. *Id.* at 735.

In fact a study of remittiturs in the federal district courts from 1991 through 2000 demonstrates that remittitur effectively eliminates a plaintiff's constitutional right to have damages tried by a jury because the alternative of a new trial is not really an option for the plaintiff. *Id.* 742-44. This study found that when judges remitted jury verdicts, in 98% of the cases the plaintiff either accepted the remittitur or settled the case. *Id.* Of this 98%, plaintiffs accepted remittitur in 71% of the cases and settlement occurred in 27% of the cases.

Id. at 744. This statistic demonstrates that a plaintiff's settlement posture is adversely impacted by the remittitur/ new trial option. In only 2% of the cases did the plaintiff actually choose new trial over remittitur or settlement. *Id.* Thus, the new trial "option" is illusory. When the trial judge announces the maximum amount that a reasonable jury could award under the facts of the case, the judge effectively announces that the plaintiff has one choice, not two, and that choice is to accept the remittitur. The study supports this reality. Thus, when a judge grants remittitur, a new trial is not a realistic option.

And particularly with regard to uncertain or unliquidated damages where it is plausible for different people to have different views on an appropriate amount, the use of remittitur demonstrates how far from the English common law the federal courts have strayed. *Id.* at 788. Under English common law, courts generally only granted motions for new trial when damages were certain and calculable such as contract or debt cases. *Id.* at 775. This re-examination of a jury's findings on subjective damages is an example of what the re-examination clause was designed to prevent, that is to say, the substitution of the judge's determination of the damages for those of the jury. *Id.* at 788-89. This re-examination of facts runs counter to the preservation of the role of the jury as the fact-finder as embodied in the Seventh Amendment and is, thus, unconstitutional even under the concept of the evolving common law.

CONCLUSION

This case presents important questions of the role of the jury and reviewing courts in employment discrimination cases. The Fifth Circuit has failed to comply with this Court's prior dictates and has taken a position that demonstrates a split of authority among the circuit courts. Furthermore, this Court is presented with an important constitutional issue that has not been adjudicated by this Court concerning the meaning of the re-examination clause under the Seventh Amendment concerning the use of remittitur by the federal courts. Therefore, review by this Court is warranted.

Respectfully submitted,

JOHN WERNER
REAUD, MORGAN & QUINN, L.L.P.
801 Laurel Street
P. O. Box 26005
Beaumont, TX 77720-6005
(409) 838-1000

KIRK L. PITTARD*
DURHAM & PITTARD, LLP
P.O. Box 190310
Dallas, Texas 75219
(214) 946-8000

Attorneys for Petitioner

* *Counsel of Record*

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JUNE 16, 2005

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 04-40569.

June 16, 2005.

Rehearing Denied July 13, 2005.

Brandon L. BRYANT,

Plaintiff-Appellee-Cross-Appellant,

v.

COMPASS GROUP USA INC., individually, doing business as Chartwells,

Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the Eastern District of Texas.

Before REAVLEY, JONES and GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Compass Group USA Inc., individually, doing business as Chartwells ("Chartwells"), appeals the jury verdict in favor of Brandon Bryant ("Bryant") for unlawful termination under

Appendix A

Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq.* Chartwells challenges the jury's finding that it terminated Bryant either because of his race or because he had filed an Equal Employment Opportunity Commission ("EEOC") charge of discrimination.

I

Chartwells employed Bryant, a white male, as a cook at their Lamar University food services operation. Chartwells provides food and beverage services to educational facilities as an independent contractor.

Bryant sought promotion at Chartwells to an open executive chef position, which was ultimately filled by Ricardo Saldana, an Hispanic employee. One month later, Chartwells transferred Francelia Madrigal, Saldana's sister-in-law, to its Lamar operation. Bryant filed a discrimination charge with the EEOC on March 26, 2002, alleging reverse race discrimination. Specifically, he claimed that Chartwells subjected him to disparate terms and conditions of employment—including by Saldana and Madrigal—and that Chartwells' management denied him a promotion to the executive chef position because of his race.

Ten days later, on April 6, 2002, Bryant, Madrigal, and Saldana worked at a bat mitzvah at a recreational area on the Lamar Campus. After the event, Madrigal informed Saldana that she had observed Bryant take an envelope from the gift table and suspected that he had disposed of the envelope in the trash behind the dining hall. Madrigal claims she looked for the envelope, but it was too dark to see anything, so she

returned the following day and found three envelopes and three checks in the trash. She informed Saldana about the checks and provided a statement to Max Mitchell, the food services director for Chartwells at Lamar. Maria Ortiz, another Chartwells employee who worked at the bat mitzvah the night before, gave a statement to Lamar University police officer Daniel Bowden.

Bryant was asked to speak with Bowden the following day when he arrived at work. Bryant agreed to pay back the $26 that he claimed represented the missing cash from the envelopes but he included a note to the girl's mother stating that he was paying the money under duress and that he maintained his innocence. Bowden informed Chartwells that Bryant confessed to taking the money and agreed to make restitution. Chartwells terminated Bryant's employment, claiming the termination was based on the police officer's statement that Bryant confessed to the theft.

Bryant filed suit asserting that Chartwells racially discriminated against him by subjecting him to adverse terms and conditions of employment, denying him a promotion to executive chef, and terminating his employment. Bryant further claimed that Chartwells unlawfully retaliated against him for filing a discrimination charge with the EEOC by terminating his employment.[1]

The district court submitted Bryant's claims of unlawful reduction in work hours, denial of promotion, and termination

1. Bryant also claimed that Chartwells defamed him to the president of Lamar University, but abandoned this claim before the beginning of trial.

of employment claims to the jury.[2] The jury found: (1) for Bryant on the termination claim; (2) for Chartwells on the promotion claim; and (3) for Bryant on the unlawful discrimination in the reduction in hours claim, but that Chartwells would have reduced Bryant's hours regardless of the unlawful motivation. The jury awarded Bryant: (1) $42,500 in actual damages; (2) $160,000 in compensatory damages; and (3) $350,000 in punitive damages. In addition, the court awarded Bryant $36,500 in attorneys' fees and $3,093.16 in costs. The district court granted Chartwells' motion for judgment as a matter of law ("JMOL") on punitive damages and granted a remittitur on the compensatory damage award to $150,000 and actual damages to $32,556.22. Bryant accepted the remittitur.

II

Title VII prohibits an employer from "discharg[ing] an individual, or otherwise discriminat[ing] against any individual . . . because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Title VII also prohibits retaliation by employers against employees who have filed a charge of discrimination. 42 U.S.C. § 2000e-3(a). The jury affirmatively answered a single question asking them to determine whether Bryant's race or retaliation for his filing of an EEOC charge of discrimination was a substantial or motivating factor in his termination. Chartwells appeals the

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2. The court granted Chartwells' motion for JMOL as to certain claims of discriminatory terms and conditions of employment at the close of Bryant's evidence and several other claims of disparate terms and conditions of employment at the close of Chartwells' evidence.

judgment in favor of Bryant, arguing the district court's denial of its motion for JMOL should be reversed.

We review a district court's denial of a motion for JMOL *de novo*. *Thomas v. Tex. Dep't of Criminal Justice*, 220 F.3d 389, 392 (5th Cir.2000). A motion for JMOL should be granted if "there is no legally sufficient evidentiary basis for a reasonable jury to find for a party." Fed.R.Civ.P. 50(a). Thus, "if reasonable persons could differ in their interpretations of the evidence, then the motion should be denied." *Thomas*, 220 F.3d at 392 (citing *Baltazor v. Holmes*, 162 F.3d 368, 373 (5th Cir.1998)). "A post-judgment motion for judgment as a matter of law should only be granted when 'the facts and inferences point so strongly in favor of the movant that a rational jury could not reach a contrary verdict.'" *Id.* (quoting *Waymire v. Harris County, Tex.*, 86 F.3d 424, 427 (5th Cir.1996)). The jury's verdict is afforded great deference. Thus, when evaluating the sufficiency of the evidence, we view all evidence and draw all reasonable inferences in the light most favorable to the verdict. *Id.*

Chartwells argues that the district court erred in failing to grant its JMOL motion on Bryant's unlawful termination claim because there was insufficient evidence for a reasonable jury to find that Bryant's race or his EEOC claim was a motivating factor it its decision to terminate his employment. Chartwells raises three arguments: (1) Bryant failed to establish a *prima facie* case of unlawful termination; (2) Bryant did not offer sufficient evidence to establish that Chartwells' reason for termination was a pretext for discrimination or if true, was only one of the reasons for its

conduct, and another "motivating factor" was the plaintiff's race or retaliation for his filing of an EEOC claim; and (3) Chartwells offered sufficient evidence that it would have made the same adverse employment decision regardless of any unlawful animus.

"[W]hen, as here, a case has been fully tried on its merits, we do not focus on the *McDonnell Douglas*[3] burden-shifting scheme. Instead, we inquire whether the record contains sufficient evidence to support the jury's ultimate findings." *Smith v. Berry Co.*, 165 F.3d 390, 394 (5th Cir.1999) (footnoted added). *See also Rutherford v. Harris County*, 197 F.3d 173, 180-81 (5th Cir.1999); *Vaughn v. Sabine County*, 104 Fed.Appx. 980, 982 (5th Cir.2004). "We need not parse the evidence into discrete segments corresponding to a prima facie case, an articulation of a legitimate, nondiscriminatory reason for the employer's decision, and a showing of pretext. 'When a case has been fully tried on the merits, the adequacy of a party's showing at any particular stage of the *McDonnell Douglas* ritual is unimportant.'" *Vaughn*, 104 Fed.Appx. at 982 (quoting *Travis v. Bd. of Regents of Univ. of Tex. Sys.*, 122 F.3d 259, 263 (5th Cir.1997)). Therefore, under a *de novo*

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3. The *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), framework requires a plaintiff to first create a presumption of discrimination by making out a *prima facie* case of discrimination. The burden of production then shifts to the defendant to establish legitimate non-discriminatory reasons for its actions. The plaintiff then bears the burden of persuading the trier of fact by a preponderance of the evidence that the employer intentionally discriminated against the plaintiff because of the plaintiff's protected status. *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir.2003).

review, this court must determine whether the record contains sufficient evidence for a reasonable jury to determine that Chartwells' stated reason for terminating Bryant was pretext or that while true, it was only one of the reasons for its conduct, and another "motivating factor" was the plaintiff's race or retaliation for his filing of an EEOC claim.

Chartwells asserts that it terminated Bryant's employment for a legitimate, non-discriminatory reason—namely that he was suspected of committing theft or that he committed theft. Chartwells claims that it maintained a policy, as stated in its General Rules and Provisions, that provided for immediate termination for "theft, reasonable suspicion of theft or accessory to theft." Bryant argues that Chartwells' reason is mere pretext for its actual motive for terminating his employment—namely that he had filed an EEOC charge alleging reverse race discrimination only three weeks prior to the events that resulted in his termination. "[T]he factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff . . . [although] it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133, 146-47, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (emphasis in original).

Bryant relies heavily on the close proximity of time between the events to demonstrate that Chartwells' reason for his termination was pretextual. In addition, Bryant claims that management's decision to have Saldana memorialize Bryant's past transgressions also demonstrates that its true

reason for terminating him was retaliation for his filing of the EEOC claim. There is no evidence, however, that this memorandum or Bryant's alleged past transgressions was the basis for his termination.

Bryant's remaining arguments focus on his innocence and that his confession came under duress. The critical issue is not what Bryant told the officer[4] and under what circumstances Bryant confessed, but what the officer relayed to Chartwells' management and what reasons Chartwells relied on in terminating Bryant. Of primary importance on this issue is the uncontroverted testimony of a disinterested third party, officer Bowden. The record indicates that he informed Chartwells management that Bryant confessed to the theft.[5] Bryant offers no evidence to demonstrate why

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4. Bowden testified at trial that Bryant never directly admitted to him that he took the cards or money:

> Q: Lt. Bowden, I thought you told me that Mr. Bryant didn't admit to taking the money?
>
> A: The words "I did it," no, you're right, he never said that.

5. Q: What did you tell Mr. Mitchell?

> A: I told Mr. Mitchell that Brandon agreed to pay back the money.
>
> Q: What else did you tell Mr. Mitchell?
>
> A: Well, I don't remember exactly what it was, but it did--I'm sure I told him that he admitted to doing it and that he would pay the money back.

(Cont'd)

Chartwells' explanation that it relied on this evidence for termination is pretext. Therefore, there is no legally sufficient evidentiary basis for a reasonable jury to find that Chartwells unlawfully terminated Bryant in retaliation for filing an EEOC charge of discrimination.

Bryant also asserted several theories to demonstrate that Chartwells' true "motivating factor" behind its decision was Bryant's race. First, Bryant argues that there was a conspiracy between the Hispanic employees—Saldana, Madrigal, and Ortiz—to get him fired and that management knew, or should have known, about this framing. Bryant concedes that none of these individuals were official decisionmakers at Chartwells and that none of them had authority to terminate his employment. However, "[i]f an employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker. . . . 'If the [formal decisionmakers] acted as the conduit of [the employee's] prejudice—his cat's paw—the innocence of the [decisionmakers] would not spare the company from liability.'" *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-27 (5th Cir.2000) (citing *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.1990)). Bryant's "cat's paw" theory is that Saldana, Madrigal, and Ortiz had unlawful racially motivated intent and that, because the decisionmakers

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(Cont'd)

> Q: Right. And you did tell Mr. Mitchell that he confessed to taking the money, didn't you?
>
> A: Yes.

relied on tainted information from these employees, the termination decision itself was tainted.

Bryant offered little evidence at trial to demonstrate a conspiracy. He claims that: (1) Saldana and Madrigal showed up at the bat mitzvah despite not being scheduled to work; (2) Bryant did not see Saldana although she claimed to have seen him take the card from the gift table; (3) Madrigal did not immediately report the theft; (4) Ortiz's son reported seeing Bryant empty the cards into the trash behind the dumpster but did not see him take the cards from the table; and (5) Madrigal claims to have found the cards in the trash, but proceeded to work the rest of the day. Even if we assume that the three Hispanic co-workers were conspiring against Bryant, he offers no evidence to demonstrate that the conspiracy was racially motivated. Similarly, Bryant does not argue that the three Hispanic employees were motivated by retaliatory intent because none of them knew that he had filed an EEOC claim. Again, he simply relies on the fact that the other employees are Hispanic and he is white.

Furthermore, Bryant's conspiracy theory fails because he offered no evidence that the official decisionmakers were involved in the conspiracy, knew about the conspiracy, or should have known about the conspiracy. Testimony at trial indicated that Chartwells relied on the police officer's report that Bryant admitted to the theft, as discussed above, in making its decision. In fact, it is Bryant who alleges that Chartwells' management failed to properly investigate the events surrounding the bat mitzvah that would have revealed this potential conspiracy. While the prudent action may have been to discuss the event with Bryant and obtain his side of

the story before terminating him, evidence that the employer's investigation merely came to an incorrect conclusion does not establish a racial motivation behind an adverse employment decision. Management does not have to make proper decisions, only non-discriminatory ones. *See Little v. Republic Refining Co.*, 924 F.2d 93, 97 (5th Cir.1991) ("even an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason" for termination). Employment discrimination laws are "not intended to be a vehicle for judicial second-guessing of business decisions, nor ... to transform the courts into personnel managers." *Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1507-08 (5th Cir.1988).

Bryant also argues that Chartwells' reason for terminating his employment was pretextual because similar conduct on the part of an Hispanic employee, Ortiz, was not disciplined in the same manner. Disparate treatment of similarly situated employees is one way to demonstrate unlawful discrimination and retaliation. *See Smith v. Wal-Mart Stores*, 891 F.2d 1177, 1180 (5th Cir.1990). To raise an inference of discrimination, the plaintiff may compare his treatment to that of nearly identical, similarly situated individuals. *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir.1995). To establish disparate treatment, Bryant must show that Chartwells gave preferential treatment to another employee under "nearly identical" circumstances. *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 514 (5th Cir.2001).

The district court concluded, in denying Chartwells' JMOL, that Bryant established disparate treatment since he and Ortiz were similarly situated employees in the minds of

the jury, both being "among the low level hourly employees." The district court stated that

> There was evidence that Max Mitchell, [Chartwells'] food director at Lamar at the time, and one of the three individuals who made the decision to fire Bryant, had been aware that Ms. Ortiz, a Hispanic, had pilfered food, alcoholic beverages, and/or table decorations. No action was taken, and [Chartwells] presented no credible evidence that Ms. Ortiz did not do these things, that any disciplinary action was administered, or that there was good reason for not administering disciplinary action. On the other hand, Bryant, who in [Chartwells'] view, was a similar, low level, hourly employee, but a Caucasian, was fired.

A reasonable jury could conclude that Bryant and Ortiz were "similarly situated" low level hourly employees. However, the alleged theft of alcohol, party decorations, and table decorations is not the same as stealing money from a client's gift table at a catered event. The allegations leveled against Ortiz involved an internal situation compared to the allegations of theft from a client in Bryant's situation. A key distinction is that the latter can result in a significant loss of business and clients for Chartwells due to the devastating effect such actions would have on its reputation as well as exposing it to civil legal liability. Moreover, since Ortiz never admitted the theft to the police or anyone else, no reasonable jury could conclude that the two events are "nearly identical."

Bryant also argues that he was subject to disparate treatment because Chartwells did not terminate Ortiz's employment after they learned she was not authorized to work in the United States. However, when Chartwells learned that Ortiz's Social Security information was invalid, they gave her forty-eight hours to provide the proper information, as company policy dictated, and when she was unable to do so, she was discharged. Again, this fails to demonstrate disparate treatment.

The record does not contain evidence sufficient to support the jury's ultimate findings. Therefore, the district court improperly denied Chartwells' motion for JMOL and the judgment should be vacated.

III

Since Bryant failed to elicit evidence at trial so that a reasonable jury could conclude that his race or retaliation for his filing of an EEOC claim was a substantial or motivating factor in his termination, we REVERSE the district court judgment and RENDER take nothing judgment against Bryant.[6]

---

6. Because we reverse the judgment for Bryant, we need not consider his claim that the elimination of the jury awarded punitive damages based on his acceptance of a remittitur of actual damages was improper. It is also unnecessary to consider Chartwells' appeal of the compensatory damages, actual damages, and attorneys' fees and costs awarded Bryant.

APPENDIX B — PLAINTIFF'S CONDITIONAL (I.E., WITHOUT INTENTION TO WAIVE APPEAL) NOTICE OF ACCEPTANCE OF REMITTITUR FILED APRIL 13, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C.A. NO. 1:02CV0496

BRANDON L. BRYANT

VS.

COMPASS GROUP USA, INC., INDIVIDUALLY
and d/b/a CHARTWELLS

PLAINTIFF'S CONDITIONAL (I.E., WITHOUT INTENTION TO WAIVE APPEAL) NOTICE OF ACCEPTANCE OF REMITTITUR

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BRANDON BRYANT, Plaintiff, through his counsel of record, JOHN WERNER, in the above entitled and numbered cause, and files this his Conditional (i.e., without intention to waive appeal) Notice of Acceptance of Remittitur, and in support of same would show as follows:

Appendix B

1.

Though not intending to waive any appellate rights, and intending to seek reconsideration of the current Fifth Circuit rule of *Sulzer Carbomedics, Inc. v. Oregon Cardio-Devices, Inc.*, 257 F.3d 449, 460-61 (5th Cir. 2001) – but recognizing that the (lack of) intention to waive rights may be irrelevant — Plaintiff hereby consents to a remittitur of actual damages in lieu of a New Trial, pursuant to the prior orders of this Court.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this paper be accepted and filed among the papers of this Honorable Court.

Respectfully submitted,

READ, MORGAN & QUINN, L.L.P.
801 Laurel Street
P. O. Box 26005
Beaumont, Texas 77720-6005
(409) 838-1000
FAX (409) 833-8236

By s/ John Werner
John Werner
Texas Bar No. 00789720

Lawyers for Plaintiff

APPENDIX C — ORDER ON PLAINTIFF'S EMERGENCY MOTION TO RECONSIDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION DATED APRIL 6, 2004 AND FILED APRIL 7, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Case No. 1:02-CV-496

BRANDON L. BRYANT

VS.

COMPASS GROUP USA, INC., INDIVIDUALLY
and d/b/a CHARTWELLS

ORDER ON PLAINTIFF'S EMERGENCY MOTION TO RECONSIDER

Before the court is Plaintiff's Emergency Motion To Reconsider Order of Remittitur Or, In The Alternative, To Extend Deadline For Filing of Remittitur. [Doc. #108] Bryant correctly points out that the final judgment [Doc. #107] entered in this case did not award the $350,000 in punitive damages found by the jury, and awarded only $150,000 of the $160,000 found by the jury in compensatory damages.

The basis for granting defendant's motion for judgment as a matter of law on the issue of punitive damages is set out in the Memorandum and Order filed February 19, 2004. [Doc. #88]. As this court noted, it was a close question, but

binding precedent required the court to enter the order. *See Hatley v. Hilton Hotels, Corp.*, 308 F.3d 473, 477 (5th Cir. 2002), *Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642, 453 (5th Cir. 2002).

The reasons for reducing the award of compensatory damage are likewise set out in the court's Memorandum and Order. [Doc. #88]. As set out in more detail in the memorandum, the evidence submitted by the plaintiff justified an award of only $150,000 under the "Maximum Recovery Rule." *See Salinas v. O'Neil*, 286 F.3d 827, 830 (5th Cir. 2002), *Williams v. Trader Publ'g Co.*, 218 F.3d 481, 486-87 (5th Cir. 2000).

The court's holding and decision not to award punitive damages was based on controlling precedent governing the amount and type of evidence needed to support an award of punitive damages. No remittitur was needed. The court simply granted defendant's motion for judgment as a matter of law.

The court's ruling on compensatory damages is a different matter. There was sufficient evidence, under controlling precedent, to justify an award of $150,000. It does not appear that, under Fifth Circuit precedent, an award of $160,000 could be granted. However no authority has been cited or found which would allow a district court in the Fifth Circuit to simply enter a judgment amount which is different than that found by a jury. *See Hetzel v. Prince Willliam County, Va.*, 523 US 208, 210-11, 118 S.Ct. 1210, 1211 (1998). Accordingly, this court ordered remittitur.

As Bryant points out, this presents him with a Hobson's choice. If he accepts the remittitur, he will, unless the court of appeals revises previous rulings, be unable to appeal either the reduction in compensatory damages or the denial of punitive damages. *Sulzer Carbomedics, Inc. v. Oregon Cardio-Devices, Inc.*, 257 F.3d 449 (5th Cir. 2001). There may be sound arguments for such a revision in policy under the facts of this case.[1] Those arguments would have to be weighed against the policy reasons for permitting remittitur which include encouraging the finality of judgments and the termination of litigation. That change in policy must be addressed to the Court of Appeals.

In the alternative, Bryant requests an extension of time to file the remittitur past the deadline for appeal. This proposal raises numerous interesting possibilities involving the interplay of the rules of civil procedure, the rules of appellate procedure, the timing of notices of appeals, the docketing of the appeal, and involuntary dismissal of appeal, all while an order granting a new trial conditioned on remittitur is in effect. The court declines to further complicate this case.

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1. The Eleventh Circuit does permit a district court to enter a judgment for punitive damages different from the verdict without allowing remittitur on the grounds that this is a decision as a matter of law and does not violate the Seventh Amendment. *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999). The Federal Circuit extended this in a case where compensatory damages were reduced to what the court said was the maximum allowed by law without permitting a remittitur. *Tronzo v. Biomet, Inc.*, 236 F.3d 1342 (Fed. Cir. 2001).

Appendix C

Plaintiff may feel at some tactical disadvantage. On the other hand, if the judgment as it now stands is correct, then the risk of an award of attorney fees on appeal, is on defendant. Presumably, plaintiff's counsel will keep careful time records, noting that the hourly rate for appellate work may sometimes be higher than that for trial work.

So that counsel for plaintiff has time to properly analyze this order and his options, the court will briefly extend the deadline for remittitur.

It is, ORDERED that plaintiff's motion to reconsider [Doc. #108] is DENIED.

It is further ORDERED that the deadline set in the court's Order [Doc. #106] for plaintiff to consent to remittitur is extended so that unless plaintiff Brandon L. Bryant files by April 14, 2004, a stipulation consenting to reduction of the verdict for compensatory damages to $150,000, a new trial be and is granted to defendant Chartwells. Defendant's motion for new trial is DENIED provided plaintiff's stipulation is filed on or before April 14, 2004.

Signed April 6, 2004.

s/ Ron Clark
Ron Clark, United States District Judge

APPENDIX D — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION DATED AND FILED APRIL 2, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Case No. 1:02-CV-496

BRANDON L. BRYANT

VS.

COMPASS GROUP USA, INC.,
D/B/A CHARTWELLS

FINAL JUDGMENT

This matter came on before the Court for trial by jury, and in accordance with the verdict of the jury and the Orders previously entered, it is **ORDERED, ADJUDGED and DECREED** that the plaintiff, Brandon Bryant, shall recover of and from defendant, Compass Group USA, Inc., d/b/a Chartwells, the following:

1. The sum of $32,556.22 in back pay;
2. The sum of $150,000 in compensatory damages;
3. The sum of $36,500.00 in attorney fees; and
4. His taxable costs of court,

for all of which let execution issue if not timely paid.

Appendix D

It is further **ORDERED** that all sums awarded shall include pre-judgment and post-judgment interest calculated pursuant to 28 U.S.C. § 1961.

It is further **ORDERED** that the court shall retain jurisdiction over Defendant's request for attorney's fees on appeal for later determination in the event that notice of appeal is filed.

This shall be considered the Final Judgement in this case, and all relief requested by either party which is not specifically granted, or reserved for later determination, is hereby denied.

SIGNED this 2nd day of April, 2004

s/ Ron Clark
Ron Clark
United States District Court Judge

APPENDIX E — MEMORANDUM AND ORDER ON ATTORNEY'S FEES, MOTION FOR NEW TRIAL, AND REMITTITUR OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION DATED AND FILED APRIL 2, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION No: 1:02-CV-496

JUDGE RON CLARK

BRANDON L. BRYANT,

Plaintiff,

v.

COMPASS GROUP USA, INC., INDIVIDUALLY AND D/B/A CHARTWELLS,

Defendant.

MEMORANDUM AND ORDER ON ATTORNEY'S FEES, MOTION FOR NEW TRIAL, AND REMITTITUR

This employment discrimination action was brought pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"). Plaintiff Brandon Bryant moves for award of attorney's fees [Doc. #89] after a trial in which a jury verdict was rendered in Bryant's favor. Defendant Compass Group USA, Inc., individually and d/b/a Chartwells' ("Chartwells") filed its renewed motion for judgment as a matter law, remittitur or alternatively, motion for new trial [Doc. # 104]. The court makes the following rulings.

Appendix E

I. PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY FEES

At trial, the jury found that Chartwells had discriminated against Bryant on the basis of his race. The jury awarded Bryant $42,500.00 in back pay, $160,000.00 in compensatory damages, and $350,000.00 in punitive damages. For the reasons stated in its Memorandum and Order filed February 19, 2004 [Doc. #88] the court found Plaintiff was entitled to $32,556.22 in back pay and $150,000.00 in compensatory damages. Bryant seeks an award of attorney's fees of $36,500.00.[1]

Title VII provides that a court may, in its discretion, award the "prevailing party" in any action under that subchapter "a reasonable attorney's fee." 42 U.S.C. § 2000e-5(k). A plaintiff may be considered a "prevailing party" if he succeeds on any significant issue in litigation that achieves some of the benefit the party sought in filing suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983). Because Bryant succeeded on his claims of termination based on his race or because he filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), he is a prevailing party entitled to a reasonable attorney's fee.

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1. Bryant's attorneys also seek an additional attorney's fee award of $20,000.00 (100 hours billed at $200 per hour) as estimated compensation for any appeal granted at the Fifth Circuit. However, Bryant's attorneys have not cited, and the court is not aware of, any authority which provides for conditional appellate attorney fees under federal law in a case such as this. An application for such fees should be made after the appeal, when the evidence of actual time spent may be reviewed.

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The determination of what is a "reasonable attorney's fee" is left to the discretion of the trial court. 461 U.S. at 433. To decide the appropriate attorney's fee, the trial court must first calculate a "lodestar" fee by multiplying the number of hours reasonably expended on the case by a reasonable hourly rate. *Rutherford v. Harris County*, 197 F.3d 173, 192 (5th Cir. 1999). Then, the court must consider the twelve *Johnson* factors to determine whether the lodestar fee should be adjusted upward or downward. *See Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974). The *Johnson* factors are:

> (1) time and labor required; (2) novelty and complication of the issues; (3) skill required; (4) whether the attorney had to refuse other work to litigate the case; (5) attorney's customary fee; (6) whether fee is fixed or contingent; (7) whether the client or case circumstances imposed any time constraints; (8) the amount involved and the results obtained; (9) attorney's experience, reputation, and ability; (10) whether the case was "undesirable;" (11) nature and length of relationship with the clients; and (12) awards in similar cases.

"[T]he most critical factor in determining the reasonableness of a fee award in a civil rights suit is the degree of success obtained." *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 491 n.31 (5th Cir. 2001)(quoting Farrar v. Hobby, 506 U.S. 103, 114, 113 S.Ct. 566 (1992)).

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A. Lodestar Fee

Bryant's attorneys, John Werner and Mary Ferguson, assert that they expended 177.5 hours and 5 hours of work, respectively, litigating this action. The court has review the "statement of tasks performed" submitted by Werner and determines that this was a reasonable number of hours worked on this litigation. Although Bryant's attorneys did not keep contemporaneous time records, their claim of 182.50 hours is substantially less than the 717.6 hours claimed by Chartwells' attorneys using a contemporaneous time-sheet recording method. A court may reduce a requested fee for failure to keep contemporaneous records. *See Hensley*, 461 U.S. at 438, 103 S.Ct. at 1942. However the records submitted indicate that counsel for Plaintiff has already done that.[2] Additionally, since Chartwells stated that it does not dispute the number of hours claimed by Bryant's attorneys,[3] and because Bryant's claim is clearly conservative, the court has determined that 182.5 hours expended is reasonable in this case.

Turning to the hourly rate, a reasonable rate is the prevailing rate in the community for similar work. *See Tollett v. City of Kemah*, 285 F.3d 357, 368 (5th Cir. 2002). Generally, such rate is established through affidavits of other attorneys practicing in the district. 285 F.3d at 368.

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2. In addition to submitting a conservative number of attorney hours, Bryant made no claim for time of any paraprofessional assistant.

3. *See* Defendant's Response [Doc. # 103/104, p. 4].

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Although Bryant's attorneys did not submit affidavits of other attorneys in the area, in Werner's own affidavit he suggests that a rate of $200 per hour is reasonable for an attorney with his qualifications. Again, Chartwells stated that it does not contest the reasonableness of the requested rate. Accordingly, the court finds that $200 is a reasonable hourly rate in this case. *See Tollett*, 285 F.3d at 369 (approving requested hourly rate where the rate was not questioned by the opposing party). Accordingly, the "lodestar" is $36,500, representing 182.5 hours worked at a billing rate of $200. Where the claimed rate and number of hours are established as reasonable, the resulting product is presumed to be reasonable. *Blum v. Stenson*, 465 U.S. 886, 897, 104 S.Ct. 1541, 1548 (1984).

B. Reduction or Increase in Fee Award

The court finds there are no factors to rebut the presumption that the lodestar fee of $36,500 is reasonable. Chartwells contends that because Bryant was not the prevailing party on all of the claims in his suit, he is not entitled to the full amount of attorney's fees requested. However, where a plaintiff's claims involve a common core of facts or are based on related legal theories, the suit cannot be viewed "as a series of discreet claims." *Hensley*, 461 U.S. at 435. What matters is the degree of the overall success achieved by the plaintiff in relation to the hours reasonably expended on the litigation. "[T]he fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *See* 461 U.S. at 435-436.

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In this case, the facts and legal theories are interrelated. Bryant claimed that he was terminated because of his race or because he filed a charge of discrimination with the EEOC and that Chartwells reduced his hours and denied him a promotion because of his race. Bryant obtained a significant part of the relief he sought when the jury found that he was terminated because of his race or the fact that he filed an EEOC charge and he was awarded back pay and compensatory damages. Bryant chose to drop his defamation claim, which was a reasonable tactical decision given the controlling evidentiary rules. This simplified the jury charge, but did not significantly change the presentation of the evidence, nor the discovery necessary. Although the jury did not find for Bryant on his claims of reduction of hours and failure to promote, as Werner states in his affidavit, "there was not a single event . . . which was not necessary had the case proceeded only on the retaliation claim." Because Bryant's unsuccessful claims are related to the successful ones, the hours spent on the unsuccessful claims should not be excluded in considering the amount of a reasonable fee.

Further, the attorney fee requested by Bryant's attorneys is reasonable in relation to the results obtained by Bryant. Bryant recovered damages of $182,556.22 on the most important issues of termination based on discrimination or retaliation. Werner's request for fees of $36,500.00 is only 20 percent of plaintiffs recovery. The court finds that such award of fees based on 182.5 hours worked is reasonable in light of the substantial relief obtained, and no reduction in the attorney's fee award is appropriate.

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Furthermore, neither a reduction nor increase in the award is warranted under *Johnson v. Ga. Highway Express, Inc.* In applying the *Johnson* factors, the court need not address factors already considered in its analysis of the "lodestar." *See Graves v. Barnes*, 700 F.2d 220, 224 (5th Cir. 1983). In analyzing these factors the court has already addressed the time and labor required, the attorney's customary fee, and the amount involved and the results obtained. This case involved no difficult or novel issues of law; it was a discrimination and retaliation case brought under well-established law. Plaintiff's counsel was of sufficient and necessary skill and experience to handle this litigation. There is no evidence that Bryant's counsel was precluded from continuing their practice while this case was ongoing. Bryant's counsel is representing plaintiff on a contingency fee basis of 40% plus expenses if appeal is not necessary, and 45% plus expenses if appeal is necessary. Bryant's counsel's law firm of Reaud, Morgan & Quinn, L.L.P. has incurred expenses of $4,697.24. There was no showing that Bryant or case circumstances imposed any time constraints. Nor was this case of an "undesirable" nature. Notwithstanding Bryant's counsel's assertion, their lack of a prior or continuing professional relationship with Bryant does not warrant an increase in the lodestar multiplier. Finally, based on the court's experience with other civil rights litigation, the court finds that the total lodestar amount in this litigation is not inconsistent with attorney's fee awards made in similar cases.

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II. RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

After reviewing the jury's verdict of back pay in the amount of $42,500, the court concluded that the evidence supported an award of $32,556.22. This was based upon Bryant's hourly rate times forty hours per week, from the time he was terminated to the date of trial, minus the $8,776.58 the evidence showed he earned. *See* Doc. #88 p. 7-8. Chartwells now claims that because Mr. Bryant found his present job after 14 months the amount of back pay should be further reduced. This appears to be an attempt to double count. The evidence before the court was that $8,776.58 was the total amount Mr. Bryant earned at all jobs, including his present job, during the time in question. If Chartwells disagreed it had ample opportunity at trial to present evidence of a higher amount. The court is not inclined to indulge Chartwells in speculative counting of mitigation amounts it could have easily presented at trial if it actually thought Bryant earned those amounts.

The other issues raised in Chartwells' renewed motion for judgment as a matter of law were considered by the court subsequent to the trial in this case. Chartwells has failed to raise a new issue or argument. The court is of the opinion that the motion should be denied for the reasons stated in the court's previous Memorandum and Order [Doc. #88].

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III. REMITTITUR

For the reasons stated in its earlier Memorandum and Order [Doc. # 88] the court found that the jury's verdict of $160,000 in compensatory damages must be reduced. As discussed in said Memorandum, controlling precedent indicates that the evidence in this case justifies an award of $150,000. (Reasonable award of $100,000 increased by 50% to avoid substituting the court's judgment for that of the jury, in order to reach "a maximum recovery" under the evidence. *See Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488-89 (5th Cir. 2001). Accordingly Defendant's motion for remittitur will be granted in part.

III. CONCLUSION

IT IS THEREFORE ORDERED, that plaintiff Brandon Bryant's Motion for Award of Attorney Fees [Doc. #89] is GRANTED IN PART and plaintiff Brandon Bryant shall be awarded attorney's fees for work performed through trial and entry of Judgment in the amount of $36,500.00.

IT IS FURTHER ORDERED that plaintiff Brandon Bryant shall be entitled to attorney's fees should he be the prevailing party in the event of any appeal, and the court will retain jurisdiction to determine those amounts if necessary.

IT IS FURTHER ORDERED that Chartwells' Renewed Motion for Judgment as a Matter of Law [Doc. #104] is hereby DENIED.

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IT IS FURTHER ORDERED that, unless plaintiff Brandon Bryant files by April 9, 2004 a stipulation consenting to a reduction of the verdict for compensatory damages to $150,000 a new trial be and is granted to defendant Chartwells. Defendant's motion for new trial is denied, provided plaintiffs stipulation is filed on or before April 9, 2004.

SIGNED April 2, 2004.

s/ Ron Clark
Ron Clark
United States District Judge

APPENDIX F — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION DATED FEBRUARY 18, 2004 AND FILED FEBRUARY 19, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Case No. 1:02-CV-496

BRANDON BRYANT

VS.

COMPASS GROUP USA, INC., INDIVIDUALLY and D/B/A CHARTWELLS

MEMORANDUM AND ORDER

This matter came on to be tried on February 3, 2004. After plaintiff rested, defendant timely made a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. At the close of the evidence, defendant timely renewed its motion.

The case was submitted to the jury on three main liability issues:

1. Whether plaintiff's hours were reduced because of his race;

2. Whether plaintiff was denied promotion because of his race; and

3. Whether plaintiff was terminated because of his race or because he had filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).

Reduction of Hours; Failure to Promote

The portions of defendant's motion and renewed motion for judgment as a matter of law as to the reduction in hours claim and the failure to promote claim are moot because the jury's answers to those questions did not place any liability on defendant. The court recognizes that the evidence supporting these two claims was weak, especially the claim of failure to promote. It was quite clear that Mr. Saldana, the individual placed in the executive chef position over Bryant was much more qualified than Bryant. However, it did not appear to the court that granting a motion for judgment as a matter of law on either of those issues would perceptibly shorten the trial. Prior to trial plaintiff had requested only six hours total time for presentation of all of his witnesses and cross-examination of all of defendant's witnesses. Based on the requests of the parties, each side was allotted seven hours total, and in fact, plaintiff used only 4 hours and 52 minutes of his time, and defendant used only 4 hours and 2 minutes of its time. Since virtually all of the evidence had to be presented anyway, there was no reason to remove those issues from the jury, considering the standard of review applicable to a judgment as a matter of law, or a summary judgment.

In any event, the jury obviously was able to recognize the meagerness of evidence that the decision not to promote Bryant was based upon discriminatory intent and found for defendant on this issue. Similarly, as to the reduction in hours claim, while the jury did find that race was a motivating factor, it also agreed with defendant that the decision would have been made anyway.

Termination

From the beginning, it appeared that the key issue in the case was whether or not Bryant had been terminated because he had filed an EEOC claim some three weeks earlier, or because of his race. The court's review of the earlier filed motion for summary judgment indicated that the race-based claim seemed the weaker of the two. The person who conceivably could have been a similarly situated person, who was not fired for theft, was Maria Ortiz.

While the evidence was not strong enough to grant summary judgment, it appeared to the court that at trial it would be firmly established that Ortiz was a low level kitchen maid doing such jobs as cleaning up and perhaps serving food. On the other hand, it appeared that Bryant was at a much higher, and more responsible position, having occupied the position of executive chef, and was likely in a position to advance in the management ranks as positions opened. It would not seem unusual if, in a large scale food business, there was less concern about low level employees engaged in cleaning the kitchen and bussing and waiting on tables who occasionally took some leftover food, already opened alcoholic beverages, and even the occasional used table

decoration after a party. On the other hand, it would be very understandable that a company could not tolerate one of its high ranking chefs, especially one who had been, and who might be in the future, on the management team, being suspected of stealing anything. Such an employee would be expected to be "up front" meeting with clients, and perhaps even serving in their homes.

However, defendant took a different view of the matter. From defendant's opening statement to the close of the case, Bryant was classified as never having been an "executive chef." Defendant took every opportunity to have him described as "only a cook" without the capability of being a chef, let alone an executive chef. The way in which Mr. Walters and Mr. Rebeil answered such questions, as much as the words they said, made it clear that there was, in the minds of management, a vast difference between an executive chef or chef, and one such as Bryant, who was considered, at best, a mere cook. Having thrust Bryant firmly down among the ranks of the low level hourly employees, defendant should not be surprised that Ms. Ortiz would, in the minds of the jury, be considered a similarly situated employee.

There was evidence that Max Mitchell, defendant's food director at Lamar at the time, and one of the three individuals who made the decision to fire Bryant, had been aware that Ms. Ortiz, a Hispanic, had pilfered food, alcoholic beverages, and/or table decorations. No action was taken, and defendant presented no credible evidence that Ms. Ortiz did not do these things, that any disciplinary action was administered, or that there was good reason for not administering disciplinary action. On the other hand, Bryant, who in defendant's view, was a similar, low level, hourly employee, but a Caucasian, was fired.

Defendant's strongest point in this regard was the testimony of Lt. Daniel Bowden, that he reported to defendant's representative that Bryant had confessed and would pay back the money taken. However, Lt. Bowden admitted that there was not an actual admission of guilt by Bryant. While one could certainly infer from Bryant's actions that he was guilty of theft, the fact that the original charges against Bryant were brought by a Hispanic woman, who evidently stole without receiving disciplinary action, and Ms. Madrigal, also Hispanic, could raise an inference of race-based animus. The strength of this inference is increased by evidence that Ms. Madrigal was the sister-in-law of the executive chef, Mr. Saldana, also Hispanic, who upon request, came up with along list of allegations of theft against Bryant, which he had never previously documented.

Additionally, it seemed evident that for some unexplained reason, Ms. Ortiz was given much greater leeway by her supervisors in such matters as whether her child could be in the work place, than was given to other women such as Veronica Dudley (African-American) and Connie Schneider, (whose race and national origin were not asked, but who appeared to be Caucasian).

Plaintiff's case of retaliation because of filing the EEOC charge began on a much stronger basis than his other claims, because he filed the charge some three weeks before being discharged. The resolution of this issue would require an evaluation of the credibility of defendant's managers in an attempt to determine whether the filing of the EEOC charge was a substantial or motivating factor. In making this decision, the jury had for its consideration the adamant

denials by Mr. Walters and Mr. Rebeil that Bryant ever had been, or was now, qualified to be, an executive chef. This stood in direct contrast of the testimony of every other witness who worked at the location, including defendant's own witness, Debbie Polk. All of these readily acknowledged that Bryant was considered to have been the executive chef, or at the very least the acting executive chef, for some period of months before Mr. Saldana arrived.

In evaluating credibility, the jury also had for its consideration defendant's dogged defense of Ms. Ortiz's credibility, in the face of many contradictory statements, a complete lack of explanation as to why her pilfering of items was overlooked, and the failure to explain why Bryant would be sent to the police for what is, under Texas law, a Class C Misdemeanor, while no report at all was made to the authorities about Ms. Ortiz' violation of federal law. One can imagine a number of reasonable explanations, but none was presented during the trial.

The testimony about other persons who had been terminated for theft was not particularly strong. None had been employed at the Beaumont location. It was not clear that any had actually been employed in the company's district or region in which Beaumont is located. There was no evidence as to whether these employees were in low level, or menial, hourly employee positions such as defendant portrayed Bryant to be. Finally, there was no evidence as to whether these employees had engaged in minor pilfering, or had been involved in the large scale theft of money, food, or beverages from central offices or warehouses.

Appendix F

It is not sufficient for defendant to claim that neither Mr. Rebeil or Mr. Walters was familiar with all of the facts about Ms. Ortiz, and as a matter of law, they should be judged solely upon the alleged report that Bryant had confessed and paid the money back. It is undisputed that a third member of the management team, Max Mitchell, an African-American, was involved in the decision. However, Mr. Mitchell never testified, and defendant chose to keep out any explanation for his termination of employment and his absence. Part of his file, consisting of some handwritten notes that he purportedly made at the time were admitted, but these do not indicate his motivation, and in actuality are merely cumulative of other testimony that had been admitted. Even if one was to suspect, or even infer, that Mitchell did not tell Walters or Rebeil about the actions of Ms. Ortiz, or about any animosity that seemed to exist between Bryant, and both Mr. Saldana and Ms. Madrigal, he, Mr. Mitchell, knew of these factors.

The court finds that there was sufficient evidence for a jury to find that a substantial or motivating factor in the decision to terminate Mr. Bryant's employment was his race or the fact that he had filed an EEOC charge, and that the same decision would not have been made in the absence of those factors. The court denies defendant's motion for judgment as a matter of law as to these issues.

After-Acquired Evidence

The court must deny defendant's motions for judgment as a matter of law on the after-acquired evidence issues. As discussed above, there was evidence that the company was

not consistent in its application of discipline for minor infractions of its policies, Ms. Ortiz being the prime example. It was uncontroverted that Bryant lied on his application to Chartwells about the length of service in prior jobs, and the reason for termination from a job. It is uncontroverted that Chartwells' policy indicates that this could be a reason for termination. However, this alone does not establish that defendant would have terminated Bryant. The burden is on the defendant to prove that it would have fired Bryant upon discovery of the falsified resume, not merely to show that its policy could have allowed him to be fired. *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1108 (5th Cir. 1995).

The court allowed the after-acquired evidence to be presented because, at a hearing, Mr. Rebeil indicated that at least two employees had been terminated for falsifying resumes. This was sufficient evidence to allow the issue to go to the jury, but was not sufficient evidence for the court to rule as a matter of law that Bryant would have been terminated. Having been allowed to present the issue to the jury, defendant was woefully unprepared to support its position. Defendant presented no more facts about persons who have been fired for falsifying applications, resumes, or other company documents. There is no evidence as to whether defendant considered the two individuals Mr. Rebeil said had been terminated as high level or managerial personnel with access to large sums of money, food, or beverages, or whether they were considered by defendant, like Bryant himself, as lowly kitchen help. The defendant had the burden of proof, and cannot be heard to complain that plaintiff failed to rebut the extremely meager evidence it presented.

Appendix F

Back Pay

Plaintiff agreed he was not entitled to front pay, since his present job pays more than he was making at Chartwells. In a Title VII case, back pay is an item of equitable damages. *See Giles v. Gen. Elec. Co.*, 245 F.3d 474 (5th Cir. 2001). The questions of back pay damages was submitted to the jury as an advisory question, and the jury returned a verdict of $42,500.00. It appears that this overstates the amount which plaintiff proved. Plaintiff had made a claim for reduction in hours prior to being fired. However, the jury found that even though race was a motivating factor, that defendant would have made the same decision regardless of such factor. Accordingly, plaintiff's hours were lawfully lower than those he had been working as acting executive chef.

The evidence indicated that he worked a 40 hour week at $10.90 per hour. It is not clear whether he would or would not have worked 40 hours every single week, nor is it clear whether on some weeks he would have had overtime. Additionally, no allowance or estimate was made for contributions that defendant would have made, as required by law, such as F.I.C.A. payments.

The jury failed to find that defendant would have been terminated as a result of the after acquired-evidence discovered on May 27, 2003. Defendant had the burden of proof on this issue and, as discussed above, there certainly was not such an overwhelming weight of evidence on this point that the jury's failure to make such finding should be taken as anything other than defendant's failure to meet its burden.

Appendix F

The court finds that there were 94 weeks and four days between April 12, 2002, the date plaintiff was terminated and the date of trial. Acting in its equitable role, the court finds that plaintiff's lost wages should be calculated at $10.90 per hour, for 94 weeks and four days. This assumes no pay increases, makes no allowance for the employer's contribution to Social Security or any other benefit program, and assumes that during this time period plaintiff would not have been off work. The court finds that the total Bryant would have been paid had he not been fired would have been at least $41,332.80. From this amount must be subtracted the amounts plaintiff earned. The evidence before the court shows this to total $8,776.58. The court therefore finds that plaintiff is entitled to $32,556.22 in back pay.

The court notes that defendant made little effort to establish a failure to mitigate. There was evidence that plaintiff obtained work as a cook at Spindletop Restaurant at $8 an hour shortly after being terminated from Chartwells. Plaintiff then voluntarily quit that job to seek a better position in Colorado. The court cannot conclude from this alone that plaintiff failed to mitigate his damages. An effort to seek a higher paying job, and one more commensurate with his previous job as acting executive chef, seems to be a reasonable attempt to mitigate damages. There is no evidence that plaintiff spent an unreasonable amount of time looking for higher paid work or failed to accept opportunities that were available. In fact, within 14 months, he was employed at a higher paying job, which eliminated any consideration of front pay.

Appendix F

Compensatory Damages

In a Title VII case plaintiff is entitled to recover compensatory damages for non-pecuniary losses such as emotional pain, suffering, mental anguish, and humiliation. *See* 42 U.S.C. § 1981 a(b)(3); see also *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488 (5th Cir. 2001). The jury awarded Bryant $160,000.00. This is below the statutory cap of $300,000 set out in 42 U.S.C. § 1981(a)(b)(3)(D). An award for emotional injury greater than nominal damages must be supported by evidence of the character and severity of the plaintiff's emotional well being. *Salinas v. O'Neill*, 286 F.3d 827, 830 (5th Cir. 2002).

One guideline in determining whether a jury award is excessive is a comparison to awards for similar injuries. *Salinas*, 286 F.3d at 830. In *Salinas* the plaintiff was not fired, but merely not promoted after a history of prior promotions. The jury awarded $1,000,000, which the court reduced to $300,000 in accordance with the statutory cap. The Court of Appeals, applying the "Maximum Recovery Rule," reduced the award to $150,000. This was based upon evidence from Salinas and his wife as to his loss of self-esteem, feelings of not being a competent agent, loss of sleep, stress, paranoia, fear of future retaliation, and high blood pressure.

In *Forsyth v. City of Dallas, Tex.*, 91 F.3d 769 (5th Cir. 1996), an award of compensatory damages of $100,000 was upheld where an officer was not fired, but was transferred in violation of her First Amendment rights. This award was premised only on plaintiff's testimony that she consulted a

psychologist and testimony about her "depression, weight loss, intestinal troubles, and marital problems." 91 F.3d at 774.

Where the jury returned a finding of sex discrimination in a discharge case, testimony of a plaintiff was sufficient to support an award of $100,000 in compensatory damages for emotional distress. *Williams v. Trader Publ'g Co.*, 218 F.3d 481 (5th Cir. 2000). In that case, plaintiff herself testified as to "severe emotional distress," "sleep loss," "severe loss of weight," and "beginning smoking." 218 F.3d at 486-487.

In *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488 (5th Cir. 2001), plaintiff testified that he had trouble "sleeping, suffered headaches, and marital difficulties, and lost the prestige and social connections associated with his position at GE [sic] and his service as treasurer of the local union." A co-worker testified that Giles appeared "despondent, depressed, down and absolutely utterly discouraged about not being able to come back to work." 245 F.3d at 488. The court held that this testimony was specific enough to allow a jury to award compensatory damages, but not as much as the $400,000 awarded by the jury, because of the $300,000 cap. 245 F.3d at 488. The court reviewed previous decisions awarding compensatory damages based upon similar evidence and concluded that the jury could reasonably award $100,000. 245 F.3d at 489. "To avoid substituting our judgment for that of the jury," the court increased the award 50 percent "to reach a maximum recovery." 245 F.3d at 489.

Mrs. Bryant testified that after plaintiff was fired: he was unbearable; he would snap at anything; he would say rude

things to me; anything little thing the kids did, he would get upset. She also testified that they suffered financial hardship, lost one of their cars, and she and the children had to move in with her mother-in-law. Mrs. Bryant said plaintiff had been the sole support of the family, and it was hard on him and on us.

Mr. Bryant presented similar testimony, saying he "was a jerk" and that he separated from his wife after the termination. He described his condition as "depression," elaborating that "I have to support my family. I have two kids. From a man's point of view, supporting your family is number 1."

Based upon the cited cases, and comparing the quantity and quality of evidence referred to in those cases with the evidence and the jury award in this case, this court finds that an award of $150,000 for compensatory damages is justified.

Punitive Damages

The jury found that defendant acted with malice or reckless indifference to plaintiff's protected rights under Title VII. There was evidence that Mr. Walters asked Mr. Saldana to "pad the file" with a memo outlining a series of thefts. This was done after the EEOC charge was filed, and also after the theft by Bryant was filed. A jury could reasonably infer that such an attempt by the highest ranking decisionmaker in the chain of command affecting this case was evidence of malice or reckless indifference to plaintiff's federally protected rights.

Additionally, it was uncontroverted that neither Mr. Rebeil nor Mr. Walters asked for Bryant's side of the story, let alone considered any statement from Bryant, before making their decision. These factors, coupled with the fact that the termination letter specifically invited Bryant to submit some information, and it is uncontested that Rebeil refused to talk to Bryant about the matter, support a finding of reckless indifference.

However, the jury was also required to find that defendant Compass Group USA, Inc. had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace. *See Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477 (5th Cir. 2002). Liability for punitive damages may not be imputed if an agent's actions are contrary to the employer's good faith effort to comply with Title VII. *Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642, 653 (5th Cir. 2002). It is uncontested that defendant had such policies and procedures in place. Defendant's exhibit numbers 6, 7, 8, and 9, set these policies and procedures out in great detail.

These policies prohibit racial discrimination, and retaliation and provide a mechanism for reporting such complaints. There was evidence that defendant made a substantial effort to publicize the policies to its employees.

Of course, this alone, would not be enough if defendant failed to enforce its policy. *Green*, 284 F.3d at 654. No evidence indicates that Bryant ever attempted to utilize any of these procedures in an attempt to notify defendant that its

managers were discriminating against him. There is no evidence that defendant Compass Group USA, Inc., as an organization, had ever failed in the past to enforce its policy, or failed to enforce it in this case.

The high managerial status of Mr. Rebeil and Mr. Walters in defendant's organization makes the question a close one. However, based upon Fifth Circuit precedent, this court must find that defendant's extensive policies against discrimination and retaliation, the efforts to notify employees about the policies, and the reporting procedures, are a good faith effort to comply with Title VII. There is insufficient evidence to establish that defendant had in general, or in this case, failed to enforce its policies. Accordingly, defendant's motion for judgment as a matter of law as to punitive damages will be granted.

Plaintiff has 10 days from the date of the signing of this order to submit documentation regarding requested attorney's fees. Defendant shall have 10 days to make any response. Either party may request a hearing on the matter. Absent such a request, the court will determine the matter of attorney's fees based upon the submissions.

Signed this the 18th day of February, 2004.

s/ Ron Clark
Ron Clark, United States District Judge

APPENDIX G — VERDICT OF THE JURY OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION FILED FEBRUARY 5, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CASE NO. 1:02-CV-496

JUDGE RON CLARK

BRANDON L. BRYANT,

Plaintiff,

v.

COMPASS GROUP USA, INC., INDIVIDUALLY AND D/B/A CHARTWELLS,

Defendant.

VERDICT OF THE JURY

We, the jury, being duly sworn or affirmed, find as follows:

Question 1 - Termination:

Do you find from a preponderance of the evidence that a substantial or motivating factor for Defendant Chartwells' termination of Plaintiff Brandon Bryant was his race or that he filed an EEOC charge of discrimination?

Appendix G

Yes: ✓ No: _____

If you have answered "YES" to Question 1, then answer Question 2, otherwise, go to Question 6.

Question 2 - Termination:

Do you find by a preponderance of the evidence that, based upon information it had available as of the date the decision was made, Defendant Chartwells would have terminated Plaintiff Brandon Bryant even if Defendant had not considered Plaintiff's race or Plaintiff's filing of an EEOC charge of discrimination?

Yes: _____ No: ✓

If you have answered "NO" to Question 2, then answer Question 3, otherwise, go to Question 6.

Question 3 - After-Acquired Evidence:

Do you find by a preponderance of the evidence that, even if Defendant Chartwells had not terminated Plaintiff Brandon Bryant on April 17, 2002, Defendant would have terminated Plaintiff's employment because Plaintiff falsified information on his job application when it discovered that information on May 27, 2003?

Yes: _____ No: ✓

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Continue on to the following questions regardless of how you answered Question 3.

Question 4 - Back Pay Damage - Termination:

What sum of money would fairly and reasonably compensate Plaintiff Brandon Bryant for the "back-pay" losses listed below which he sustained, if any, as a result of his termination?

Address each element individually. Do not assess damages in one element for any other element.

Please answer in dollars and cents, if any.

A. Past lost wages and benefits from April 12, 2002 through May 27, 2003:

   Amount: *$22,500.00*

B. Past lost wages and benefits from May 27, 2003 through the date of your verdict:

   Amount: *$20,000.00*

Question 5 - Compensatory Damages:

What sum of money would fairly and reasonably compensate Plaintiff Brandon Bryant for the non-pecuniary losses listed below which he sustained, if any, as a result of his termination?

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Please answer in dollars and cents, if any.

A. Past non-pecuniary losses, such as past emotional pain, suffering, mental anguish, and humiliation.

Amount: *$160,000.00*

Question 6 - Work Hours:

Do you find from a preponderance of the evidence that a substantial or motivating factor for Defendant Chartwells' decision to reduce Plaintiff Brandon Bryant's work hours was his race?

Yes: ✓ No: _____

If you have answered "YES" to Question 6, then answer Question 7, otherwise, go to Question 10.

Question 7 - Work Hours:

Do you find by a preponderance of the evidence that, based upon information it had available as of the date the decision was made, Defendant Chartwells would have reduced Plaintiff Brandon Bryant's work hours even if Defendant had not considered Plaintiff's race?

Yes: ✓ No: _____

If you have answered "NO" to Question 7, then answer Question 8, otherwise, go to Question 10.

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Question 8 - Back Pay Damages - Work Hours:

What sum of money would fairly and reasonably compensate Plaintiff Brandon Bryant for the "back-pay" losses listed below which he sustained, if any, as a result of the reduction in work hours?

Address each element individually. Do not assess damages in one element for any other element.

Please answer in dollars and cents, if any.

A. Past lost wages and benefits:

Amount: _____

Question 9 - Compensatory Damages- Work Hours:

What sum of money would fairly and reasonably compensate Plaintiff Brandon Bryant for the non-pecuniary losses listed below which he sustained, if any, as a result of the reduction in hours?

Please answer in dollars and cents, if any.

A. Past non-pecuniary losses, such as past emotional pain, suffering, mental anguish, and humiliation.

Amount: _____

Appendix G

Question 10 - Promotion:

Do you find from a preponderance of the evidence that a substantial or motivating factor for Defendant Chartwells' decision to deny Plaintiff Brandon Bryant a promotion was his race?

Yes: _____ No: ___✓___

If you have answered "YES" to Question 10, then answer Question 11, otherwise, go to Question 14.

Question 11 - Promotion:

Do you find by a preponderance of the evidence that, based upon information it had available as of the date the decision was made, Defendant Chartwells would have denied him a promotion even if Defendant had not considered Plaintiff's race?

Yes: _____ No: _____

If you have answered "NO" to Question 11, then answer Question 12. Otherwise, go to Question 14.

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Question 12 - Back Pay Damages - Promotion:

What sum of money would fairly and reasonably compensate Plaintiff Brandon Bryant for the "back-pay" losses listed below which he sustained, if any, as a result of the denial of promotion?

Please answer in dollars and cents, if any.

A. Past lost wages and benefits:

Amount: _____

Question 13 - Compensatory Damages - Promotion:

What sum of money would fairly and reasonably compensate Plaintiff Brandon Bryant for the non-pecuniary losses listed below which he sustained, if any, as a result of the denial of promotion?

Please answer in dollars and cents, if any.

A. Past non-pecuniary losses, such as past emotional pain, suffering, mental anguish, and humiliation.

Amount: _____

Go to Question 14.

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Question 14 - Punitive Damages:

If you have answered "NO" to Question 2, 7, or 11, then answer Question 14. Otherwise, do not answer the following questions.

Do you find from a preponderance of the evidence that Defendant Chartwells acted with malice or reckless indifference to Plaintiff's Brandon Bryant's protected rights under Title VII?

Yes: ✓ No: _____

If you have answered "YES" to Question 14, then answer Question 15, otherwise, do not answer question 15.

Question 15 - Punitive Damages:

What amount of punitive damages, if any, should be assessed against Defendant Chartwells?

Please answer in dollars and cents, if any.

Amount: *$350,000.00*

Appendix G

s/ Sandra Harvey
Foreperson

02/05/04
Date

1. s/ Cheryl Dean
   Cheryl Dean

2. s/ Jason Tanner
   Jason Tanner

3. s/ Margaret Trussell
   Margaret Trussell

4. s/ Jennings Lanting
   Jennings Lanting

5. s/ Wilburn Young
   Wilburn Young

6. s/ Travis Whitfill
   Travis Whitfill

7. s/ Sandra Harvey
   Sandra Harvey

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 13, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-40569

BRANDON L. BRYANT

Plaintiff - Appellee-Cross-Appellant

v.

COMPASS GROUP USA INC, individually, doing business as Chartwells

Defendant - Appellant-Cross-Appellee

Appeals from the United States District Court for the Eastern District of Texas, Beaumont

ON PETITION FOR REHEARING

Before REAVLEY, JONES and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge

Supreme Court, U.S.
FILED
DEC - 2 2005
OFFICE OF THE CLERK

No. 05-478

In the Supreme Court of the United States

BRANDON L. BRYANT,

Petitioner,

v.

COMPASS GROUP USA, INC., d/b/a Chartwells,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

C. PHILLIP WELLS
NICOLE L. THARRINGTON
COMPASS GROUP
THE AMERICAS DIVISION
2400 YORKMONT ROAD
CHARLOTTE, NC 28217
(704) 329-4000

KERRY E. NOTESTINE
Counsel of Record
EVE MANTELL MCFADDEN
LITTLER MENDELSON, P.C.
1301 MCKINNEY STREET
SUITE 1900
HOUSTON, TX 77010
(713) 951-9400

Counsel for Respondent
Compass Group USA, Inc.

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

1) Did the Fifth Circuit's reversal of the trial court's denial of Respondent's motion for judgment as a matter of law and rendering judgment for Respondent conflict with this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000)?

2) Does a split exist among the circuit courts regarding the propriety of considering a plaintiff's prima facie case when determining whether a plaintiff has produced sufficient evidence of discrimination or retaliation?

3) Did the trial court violate the Seventh Amendment by requiring Bryant to choose between remittitur and a new trial?

CORPORATE DISCLOSURE STATEMENT

Compass Group U.S.A., Inc. is ultimately owned by Compass Group PLC which is publicly traded on the London Stock Exchange. In addition, Compass Group U.S.A., Inc. has the following intermediary parent corporations:

Compass Holdings, Inc.
Compass Group U.S.A. Investment LLC
Compass Overseas Holdings Ltd.
Compass Group Holdings PLC
Hospitality Holdings Ltd.

Compass Group PLC is the only publicly traded corporation that owns 10% or more of Compass Group U.S.A., Inc.'s stock.

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STATEMENT OF THE CASE[1]

I. Introduction

The defendant, Compass Group USA, Inc. d/b/a Chartwells (Chartwells) terminated the employment of the petitioner, Brandon Bryant (Bryant), after a police officer informed Chartwells that Bryant had confessed to stealing money from a catered event at which Bryant was working. R9:239. Bryant subsequently filed this lawsuit asserting that the Company discriminated against him because he is a Caucasian by subjecting him to adverse terms and conditions of employment, denying him a promotion to Executive Chef, and terminating his employment. R1:112-114. Bryant further claimed that Chartwells unlawfully retaliated against him after he filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) by terminating his employment. *Id.*

The district court conducted the trial of this case in February of 2004. Bryant presented his evidence to the jury and Chartwells moved for judgment as a matter of law (JMOL). R9:205-211. The court granted the JMOL as to certain claims of discriminatory terms and conditions of employment. R9:212-13. Chartwells then presented its case, and again timely moved for JMOL. R10:30-31. The court dismissed several other claims of disparate terms and conditions of employment and submitted Bryant's claims of unlawful reduction in work hours, denial of promotion, and

---

[1] Respondent has not had access to the record in this matter since the Petitioner's appeal to the Fifth Circuit Court of Appeals. Therefore, Respondent's citations to the record mirror those in its brief filed with the Fifth Circuit.

termination of employment to the jury. R10:31-33. The jury returned a verdict for Bryant on the termination claim, found for Chartwells on the promotion claim, and found unlawful discrimination on the reduction in hours claim, but that Chartwells would have reduced Bryant's hours regardless of the unlawful motivation. RE 3. The jury awarded Bryant $42,500 in actual damages, $160,000 in compensatory damages, and $350,000 in punitive damages. RE 3.

After the jury's verdict, the court granted Chartwells' motion for JMOL made at trial on punitive damages and ordered a new trial unless Bryant accepted a remittitur on the compensatory damage award to $150,000. Pet. App. E at 31a. The court denied the motion for JMOL in all other respects. *Id.* Subsequent to the jury's verdict and prior to issuing a final judgment, Chartwells renewed its JMOL and sought a further remittitur on damages and a new trial. RE 5. The court issued its final judgment on April 2, 2004 wherein it denied Chartwells' renewed motion for JMOL. Pet. App. D at 20a-21a. Chartwells again renewed its motion for JMOL, which the court denied. Pet. App. E at 29a. Thereafter, Chartwells timely appealed to the Court of Appeals. RE 2.

The Fifth Circuit Court of Appeals reversed the denial of Chartwells' motion for JMOL and rendered judgment for Chartwells. *Bryant v. Compass Group USA, Inc.*, 413 F.3d 471, 479 (5th Cir. 2005). The Court of Appeals found that Bryant offered no legally sufficient evidence of pretext in Chartwells' stated reason for terminating Bryant. *Id.* at 477. The Court of Appeals also found that there was insufficient evidence to support the jury's ultimate finding that race or unlawful retaliation motivated Chartwells' termination of Bryant's employment. *Id.* at 479. The Court of Appeals did not reach the damages issues in the case including whether

Petitioner could challenge the JMOL eliminating the punitive damage award based on the Bryant's acceptance of the remittitur of actual damages. *Id.* at 479, n.6.

II. Statement of Material Facts

Chartwells is a provider of food and beverage services to educational facilities in the United States on an independent contractor basis. R9:221. Chartwells has provided such services to Lamar University (Lamar or the University) since July 1999. R9:222-23. Chartwells also provides catering services to events held on the University campus. *Id.* During the majority of Bryant's employment, Max Mitchell (African-American) was the Food Services Director for Chartwells at Lamar. R9:228. Jon Walters (Caucasian) is a District Manager for Chartwells and is responsible for supervision and account management at several Chartwells' operations throughout Texas and three other states. R9:221-22. Paul Rebeil (Hispanic) is Chartwells' Field Human Resources Director for company facilities in the Southwest, including Texas. R9:285, 114-15. Chartwells' operations at Lamar fall under both Walters' and Rebeil's supervision.

During his employment, Bryant worked as a cook, an hourly position, although there was no dispute that he performed work as a chef particularly after the prior Executive Chef left the company. R7:91, 94. Bryant sought a promotion to the open Executive Chef position, but ultimately did not receive that position. R7:159. The Company selected an Hispanic employee, Ricardo Saldana, who had been working for another Chartwells' account. R7:159, 161. A month or so after Walters transferred Saldana to the Executive Chef position at Lamar, Francelia Madrigal, also Hispanic, transferred to the Chartwells' account at Lamar. R7:125. Madrigal is Saldana's sister-in-

law. R7:125. At Lamar, Madrigal worked in a different department and for a different supervisor than Bryant. R9:91.

On the evening of April 6, 2002, Chartwells provided catering services for a bat mitzvah at Gladys City — a recreation area on the Lamar campus. R7:167. Bryant worked at the event with other Chartwells' employees, including Maria Ortiz (Hispanic). R9:275. Madrigal later came to the event to assist because she had finished working at a different catered function. R9:69-70. Ortiz's son, Alex, who was not a Chartwells employee, also was at the bat mitzvah. R7:224-25. After the bat mitzvah, Madrigal saw Bryant take envelopes from the bat mitzvah gift table and suspected that he had disposed of the envelopes in the trash behind the dining hall. R9:97-98. Madrigal and Ortiz looked in the dumpster that evening for the envelopes, but it was too dark to see anything. R9:98-99. The following day (Sunday, April 7, 2002) Madrigal looked in the dumpster behind the dining hall. R9:99. She located three gift envelopes and cards containing checks from the bat mitzvah. R9:27, 99-100. Madrigal called Saldana to inform him of what she found. R9:27. She placed the items in a plastic bag and secured them in her supervisor's office. R9:100.

On Monday, April 8, 2002, Madrigal provided a statement to Mitchell regarding what she had seen. R9:100-101. Mitchell informed the Lamar Police about the incident and Lamar Police Officer, Daniel Bowden (Lt. Bowden) conducted an investigation. During Lt. Bowden's investigation, he also took a statement from Maria Ortiz. R7:200, 219 R9: 158-59. When Bryant came to work on Tuesday, April 9, 2002, Mitchell told him that he needed to speak to Lt. Bowden. R7:169. Bryant met with Lt. Bowden and agreed to pay back $26 dollars that Bryant said

represented the missing cash. R9:160-61. Prior to meeting with Bryant, Lt. Bowden did not, and could not, have known how much cash was missing from the gift envelopes. R9:160-61. Bryant ultimately brought a money order to Lt. Bowden for $26. R7:170; ¶ 1. Lt. Bowden told Chartwells that Bryant confessed to taking the money and had agreed to make restitution. R9:161-62. Chartwells terminated Bryant's employment based on the police officer's statement that Bryant had confessed to the theft and agreed to pay restitution. R9:239. The University also requested that Chartwells not return Bryant to work after the theft incident. R9:315. Walters (Caucasian) was the ultimate decision-maker, and Mitchell (African American) and Rebeil (Hispanic) also were involved in the decision. R9:249.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Opinion in *Bryant v. Compass Group USA, Inc.* Follows This Court's Opinion in *Reeves v. Sanderson Plumbing* With Respect to the Showing Required For Judgment as a Matter of Law.

Bryant's Petition claims that the Fifth Circuit's opinion below conflicts with this Court's holding in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), by requiring Bryant to make a "pretext plus" showing in order to withstand a motion for JMOL. Contrary to Bryant's argument, however, the Fifth Circuit expressly relied on *Sanderson Plumbing* in its decision. The Fifth Circuit found that there was no legally sufficient evidence to demonstrate pretext in Chartwells' stated reason for terminating Bryant and Bryant insufficient evidence to establish that race or unlawful retaliation motivated Chartwells' decision. *Bryant v. Compass Group USA., Inc.*, 413 F.3d 471 (5th Cir. 2005). Because Bryant could not make the requisite showing as

mandated by *Sanderson Plumbing*, the Fifth Circuit reversed the trial court's denial of Compass Group's motion for judgment as a matter of law and rendered a take-nothing judgment against Bryant. *Id.* at 479.

In *Sanderson Plumbing*, the Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Sanderson Plumbing*, 530 U.S. at 148. With respect to the standard in reviewing a judgment as a matter of law, the Court noted that a reviewing court "must draw all reasonable inferences in favor of the nonmoving party." *Id.* at 150. Further the reviewing court must not make any credibility determinations. *Id.* Moreover, credence must be given to the evidence favoring the nonmoving party as well as evidence supporting the moving party that is uncontradicted and unimpeached where that evidence comes from a disinterested third party. *Id.* at 151.

A review of the Fifth Circuit's opinion below demonstrates that the court followed the mandates of *Sanderson Plumbing*. The court below indicated several times that it reviewed the entire record in making its decision. "[W]hen evaluating the sufficiency of the evidence, we view all evidence and draw all reasonable inferences in the light most favorable to the verdict." *Bryant*, 413 F.3d at 475. The court also noted that while it would not "parse the evidence into discrete segments corresponding to a prima facie case, an articulation of a legitimate, nondiscriminatory reason for the employer's decision, and a showing of pretext," it would "inquire whether the record contains sufficient evidence to support the jury's ultimate finding." *Id.* at 476.

The court specifically found that there was no legally sufficient evidence to find that Chartwells' asserted justification for Bryant's termination was false. *Id.* at 477. Thus, Bryant was not able to establish the second part of the *Sanderson Plumbing* analysis, making irrelevant an analysis regarding the strength of the prima facie case. Accordingly, the Court of Appeals did not make a decision inconsistent with existing Supreme Court authority.

Bryant complains that the Fifth Circuit "did not consider Bryant's prima facie case nor discuss how Bryant's prima facie case factored into the court's evidentiary analysis." Pet. 14. However, Bryant's Petition fails to identify how his prima facie case would cast doubt on Chartwells' articulated legitimate, nondiscriminatory reason for his termination. The court below determined that Bryant failed to produce any evidence to rebut or contradict Chartwells' reliance on the statement of a police officer—a disinterested third party—that Bryant had confessed to a theft at the bat mitzvah. *Bryant*, 413 F.3d at 477. With respect to Bryant's discrimination claim, none of the evidence used to prove his prima facie case of discrimination relates in any way to Chartwells' proffered legitimate, nondiscriminatory reason for his termination—that the police officer reported that Bryant confessed to the theft. Similarly, the proof used by Bryant in proving his prima facie case of retaliation does not tend to disprove Chartwells' reason for his termination. With respect to the retaliation claim, Bryant relies on the proximity in time between his filing of an EEOC charge and his termination. However, this evidence does not cast doubt on the testimony of the police office that he told Chartwells that Bryant confessed to the theft. As a result, Bryant has failed to demonstrate to this Court that evidence related to his prima facie case could factor into the Fifth Circuit's analysis.

Moreover, the additional evidence that Bryant identifies in his Petition fails to establish evidence of pretext. Pet. 14. The Fifth Circuit expressly rejected Bryant's claim that the alleged conspiracy among the Hispanic employees to "set-up" Bryant established pretext because none of the Hispanic employees were decision-makers and Bryant failed to show that any of them influenced the actual decision-makers. *Bryant*, 413 F.3d at 477-78. Further, the alleged conspiracy among the Hispanic employees would not be evidence related to pretext, but to actual unlawful intent. On that issue, the Fifth Circuit found that there was no evidence that the conspiracy was racially motivated or that the alleged conspiracy was based on unlawful retaliation because the Hispanic employees did not know that Bryant had filed a Charge of Discrimination with the EEOC. *Id.* at 477. The Fifth Circuit also addressed other evidence in the record related to unlawful motivation such as alleged disparate treatment of similarly situated employees, but determined that there was no such evidence to support the jury's verdict. Bryant does not challenge that determination in his Petition.

Sanderson Plumbing requires Bryant to submit sufficient evidence of pretext in order to withstand a motion for judgment as a matter of law. Such pretext evidence was absent from this case. The record is undisputed that Chartwells terminated Bryant after Lt. Bowden informed the company that Bryant confessed to stealing the money at the bat mitzvah. There simply was no way Bryant could or did dispute this evidence after both Lt. Bowden and Walters, the decision-maker, testified to this fact. Because Bryant failed to meet the standard set forth in *Sanderson Plumbing* by producing "sufficient evidence of pretext," the Fifth Circuit properly reversed the denial of the motion for judgment as a matter of law. Bryant's claim that the Fifth Circuit somehow

required him to show "pretext plus" must be rejected on the basis that Bryant failed to produce any evidence of pretext.

II. No Circuit Split Exists Regarding the Consideration of a Plaintiff's Prima Facie Case in Determining Whether the Plaintiff Has Demonstrated Unlawful Discrimination or Retaliation.

Bryant's Petition alleges that the circuit courts have split on the issue of whether *Sanderson Plumbing* requires consideration of a plaintiff's prima facie case in determining whether the plaintiff has established sufficient evidence of pretext following a grant or denial of a motion for judgment as a matter of law. Bryant claims that certain circuit courts have held that the reviewing court must consider the evidence proffered during a plaintiff's prima facie case in considering the sufficiency of evidence regarding pretext. Pet. 15. Bryant apparently argues that the Fifth Circuit has rejected these holdings because of its statement in *Bryant* that the court would not "parse the evidence into discrete segments corresponding to a prima facie case, an articulation of a legitimate, nondiscriminatory reason for the employer's decision and a showing of pretext." *Bryant*, 413 F.3d at 476.

The Fifth Circuit's refusal in *Bryant* to parse the evidence into discrete segments in no way reflects a refusal by that court to consider all of the evidence presented by Bryant. As discussed above, the Fifth Circuit indicated in the *Bryant* decision that it reviewed the entire record in rendering its decision. *Bryant*, 413 F.3d at 476 ("'[W]e inquire whether the record contains sufficient evidence to support the jury's ultimate findings" (quoting *Smith v. Berry Co.*, 165 F.3d 390, 394 (5th Cir. 1999)). In fact, none of the cases cited by Bryant as evidence of a split among the circuits warrants the conclusion that the circuits have different standards when

reviewing whether a plaintiff has provided sufficient evidence of pretext. Bryant mistakes the Fifth Circuit's refusal to compartmentalize a plaintiff's evidence for a refusal to consider a plaintiff's prima facie evidence. Indeed, in nearly all of the cases cited by Bryant, including those in the Fifth Circuit, the courts expressly noted that they reviewed the entire record in their respective cases. *See Miller v. EBY Realty Group LLC*, 396 F.3d 1105, 1110 (10th Cir. 2005) ("[W]e consider the record in its entirety"); *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 812 (10th Cir. 2000) ("We shall review all the evidence in the record"); *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 574 (5th Cir. 2003) ("We must examine all the evidence in the record as a whole"); *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 384 (5th Cir. 2003) ("We will therefore review all of the evidence in the record").

Bryant is incorrect that the Fifth Circuit follows a different standard of review with respect to evidence regarding a plaintiff's prima facie case of unlawful discrimination or retaliation. Bryant implies that the *Nabors Drilling* court disregarded evidence of the plaintiff's prima facie case by stating that parsing evidence into discrete segments is unimportant when a case has been fully tried on the merits. Pet. 16. However, as quoted above, the Fifth Circuit in *Nabors Drilling* expressly stated that it would review the entire record. *Nabors Drilling*, 330 F.3d at 384. Further, Bryant's claim that the court in *Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463 (5th Cir. 2002), refused to consider evidence of the plaintiff's prima facie case where the case had been fully tried on the merits (Pet. 16) completely misstates the holding in *Raggs*. Contrary to Bryant's representation, the *Raggs* court stated: "[W]hen a full trial on the merits has been conducted, this Court focuses not on the plaintiff's *prima facie* case, but on the ultimate question of whether the record

contains evidence to support a jury finding of race discrimination." *Raggs*, 278 F.3d at 468.

In sum, Bryant has failed to demonstrate that a circuit split exists by distinguishing between those courts that parse the evidence and those that do not. This is a distinction without a difference because all of the circuits at issue review the entire record when determining whether a plaintiff has provided sufficient evidence of unlawful retaliation or discrimination. The entire record includes evidence on the issues of Bryant's prima facie case, pretext, and unlawful motivation. Therefore, review by this Court is not appropriate based on Bryant's claim that the lower court's decision reflects a split in the courts of appeals.

III. The Question of the Constitutionality of Remittitur in Light of the Seventh Amendment's Re-Examination Clause Does Not Warrant Consideration by this Court

A. *Bryant's Failure to Produce Sufficient Evidence of Pretext Precludes Review of Any Constitutional Issues Related to the Conditional Remittitur Order*

Because the Fifth Circuit properly held that Bryant failed to produce sufficient evidence to support the jury's verdict finding that Compass Group unlawfully discriminated and/or retaliated against him, the Court of Appeals never addressed the Seventh Amendment issue raised by Bryant in his Petition. Similarly, the issue of whether the trial court violated the Seventh Amendment by giving Bryant the option of remittitur or a new trial is not properly before the Court because Bryant's failure to demonstrate that there was sufficient evidence to support the jury's verdict makes both a new trial and damages unavailable. Therefore, this Court cannot

consider the question of the constitutionality of the remittitur procedure based on the record in this case.

B. *Bryant Cannot Appeal His Acceptance of the Remittitur*

Bryant argues that his "conditional acceptance" of the remittitur preserves the issue for appeal. Pet. 17. Bryant's claim ignores this Court's contrary jurisprudence on the ability of a plaintiff to appeal an accepted remittitur. In *Dononvan v. Penn Shipping Co.*, 429 U.S. 648 (1977), this Court held that "a plaintiff cannot 'protest' a remittitur he has accepted in an attempt to open it to challenge on appeal." *Donovan*, 429 U.S. at 649. Accordingly, federal courts have refused to allow plaintiffs to appeal remittitur orders once accepted. *See, e.g., Anderson v. Roberson*, 249 F.3d 539, 542 n.2 (6th Cir. 2001) ("Plaintiffs' attempt to accept the remittitur under protest is plainly inappropriate"); *Rangolan v. County of Nassau*, 370 F.3d 239, 243-44 (2d Cir. 2004) (plaintiff not allowed to appeal reduction in awards once conditional remittitur accepted).

Bryant cites no authority for the proposition that he can preserve his objection to the remittitur procedure by "conditionally accepting" it. Therefore, in light of definitive precedent holding otherwise, this Court should reject Bryant's attempt to raise the issue.

C. *The Supreme Court Has Already Declared Conditional Remittitur Constitutional*

Bryant's Petition argues that requiring a plaintiff to choose between a new trial and remittitur raises an important question of constitutional law not yet decided by this Court. Pet. 16. Specifically, Bryant claims that forcing a party to choose

between a new trial and remittitur violates the Seventh Amendment's right to a jury trial. *Id.* However, Bryant's argument is contrary to established precedent from this Court.

This Court has previously held that the conditional remitter procedure about which Bryant complains does not violate the Seventh Amendment. In *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), this Court stated that the Seventh Amendment does not inhibit a trial court's discretion to overturn verdicts for excessiveness or to order a new trial unconditionally, or to condition the order of a new trial on the verdict winner's refusal to agree to a reduction. *Gasperini*, 518 U.S. at 433. The decision in *Gasperini* expressly noted that the Court's prior decision in *Dimick v. Schiedt*, 293 U.S. 474 (1935), stands for the proposition that remittitur withstands attack under the Seventh Amendment. *Id.* In *Dimick*, the Court noted it had never expressed doubt about the ability of a trial court to order conditional remittitur. *Dimick*, 293 U.S. at 483. Further, in *Hetzel v. Prince William County, Va.*, 532 U.S. 208 (1998), the Court held that the remittitur procedure withstands scrutiny under the Seventh Amendment provided that the trial court offers the choice of a new trial. *Hetzel*, 523 U.S. at 211.

Bryant provides no basis in his Petition for the Court to review the conditional remittitur procedure. Bryant must demonstrate error by the Court of Appeals on the liability issue before this Court may consider the remittitur issue. Bryant cannot demonstrate such error. Moreover, by accepting remittitur, Bryant lost any ability to appeal the trial court's conditional remittitur order. Further, this Court previously has held that the conditional remittitur procedure does not violate the Seventh Amendment. Therefore, Bryant has failed to raise any issue justifying review of the lower court's decision.

CONCLUSION

For the foregoing reasons, Bryant's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KERRY E NOTESTINE
Counsel of Record
EVE MANTELL MCFADDEN
LITTLER MENDELSON, P.C.
1301 McKinney Street, Suite 1900
Houston, Texas 77010
(713) 951-9400

C. PHILLIP WELLS
NICOLE L. THARRINGTON
COMPASS GROUP,
THE AMERICAS DIVISION
2400 Yorkmont Road
Charlotte, North Carolina 28217
(704) 329-4000

Counsel for Respondent
Compass Group USA, Inc.